

Spring 2009

Does the Constitutional Norm of Separation of Church and State Justify the Denial of Tax Exemption to Churches that Engage in Partisan Political Speech

Johnny Rex Buckles

University of Houston Law Center, jrbuckles@central.uh.edu

Follow this and additional works at: <http://www.repository.law.indiana.edu/ilj>

 Part of the [Constitutional Law Commons](#), [Religion Law Commons](#), and the [Tax Law Commons](#)

Recommended Citation

Buckles, Johnny Rex (2009) "Does the Constitutional Norm of Separation of Church and State Justify the Denial of Tax Exemption to Churches that Engage in Partisan Political Speech," *Indiana Law Journal*: Vol. 84: Iss. 2, Article 2.

Available at: <http://www.repository.law.indiana.edu/ilj/vol84/iss2/2>

This Article is brought to you for free and open access by the Law School Journals at Digital Repository @ Maurer Law. It has been accepted for inclusion in Indiana Law Journal by an authorized administrator of Digital Repository @ Maurer Law. For more information, please contact wattn@indiana.edu.



JEROME HALL LAW LIBRARY

INDIANA UNIVERSITY
Maurer School of Law
Bloomington

Does the Constitutional Norm of Separation of Church and State Justify the Denial of Tax Exemption to Churches that Engage in Partisan Political Speech?

JOHNNY REX BUCKLES*

INTRODUCTION

The inquisitions have begun. Armed with an aggressive, formal compliance initiative¹ and informed by vigilant watchdog groups,² the Internal Revenue Service (IRS) is investigating churches³ to determine whether their leaders have spoken out of

* Associate Professor of Law, University of Houston Law Center. I thank the University of Houston for its financial support of this project. I also thank the participants in the Washington and Lee University School of Law's faculty colloquium series for helpful comments to a manuscript that previewed elements of the analysis in this Article. I further thank Professor Samuel Calhoun for insightful comments to a draft of this Article. Finally, I thank my wife, Tami, for her constant support.

1. The compliance initiative has involved examinations of alleged electioneering by tax-exempt charities since the 2004 election cycle. See POLITICAL ACTIVITIES COMPLIANCE INITIATIVE PROJECT TEAM, INTERNAL REVENUE SERV., FINAL REPORT: PROJECT 302 (2006) [hereinafter PACI FINAL REPORT] (describing the examination of numerous cases involving alleged electioneering by charities during the 2004 election cycle); Peter Panepento, *IRS Investigates 350 Charities over Charges of Improper Politicking*, CHRON. PHILANTHROPY, June 14, 2007, at 48 (describing the investigations launched by the IRS of alleged electioneering by charities during the 2006 election cycle). The initiative coincides with increased agency staffing and attention to the tax-exempt organizations sector. See Elizabeth Schwinn, *IRS Takes a Tougher Stance*, CHRON. PHILANTHROPY (Wash., D.C.), Oct. 12, 2006, at 25 (reporting that the director of the Exempt Organizations division of the IRS has stated that the agency "intends to be vigorous about investigating" political campaigning by charities; stating that the Exempt Organizations division has recently added 100 full-time employees and has expanded examinations of entities).

2. According to the IRS, the "vast majority of, if not all, § 501(c)(3) organization examinations alleging political campaign intervention" result from referrals to the agency. PACI FINAL REPORT, *supra* note 1, at 3 n.3. As of March 10, 2008, Americans United for Separation of Church and State disclosed that it had filed thirteen complaints with the IRS concerning the alleged political activities of religious organizations over the past year. See Suzanne Sataline, *Obama Pastors' Sermons May Violate Tax Laws*, WALL ST. J., Mar. 10, 2008, at A1. Other watchdog groups have also reported the alleged political activities of churches to the IRS in recent years. See David Hanners, *Group Questions \$2 Million in Loans to Pastor*, ST. PAUL PIONEER PRESS, Feb. 9, 2007, at 1B (discussing the watchdog group CREW); Jennifer Mock, *Flier Prompts Call for Probe*, THE OKLAHOMAN, Oct. 31, 2006, at 5A (describing the filing of complaints by two watchdog groups concerning a pastor's support for an Oklahoma representative seeking reelection); Stephanie Strom, *Watchdog Group Accuses Two Churches of Political Action*, N.Y. TIMES, Oct. 26, 2006, at A19 (describing the filing of a complaint by CREW concerning the 2006 election for Kansas Attorney General).

3. This Article refers to all religious organizations that operate primarily to foster worship, religious education, spiritual fellowship, and service as "churches," regardless of their doctrine or rituals.

place or welcomed the wrong people during the 2008 presidential election campaigns.⁴ Consider the following: In June of 2007, having been invited to address the fiftieth anniversary of the General Synod of the United Church of Christ one year before announcing his campaign for the presidency, Senator (now President) Barack Obama—along with sixty other platform guests—spoke to fellow church members about the role of his personal faith in his professional calling. The IRS subsequently opened an investigation of the church's role in the event.⁵ Two months later, a Buena Park pastor, Wiley S. Drake, personally endorsed former Arkansas governor Mike Huckabee in his presidential bid, first in a news release and later on Drake's radio show. A letter of inquiry from the IRS followed within six months of the endorsement.⁶ Americans United for Separation of Church and State has asked the IRS to investigate several other churches. One target of the watchdog group is the Pentecostal Temple Church of God in Christ of Las Vegas, Nevada, which shared its pulpit with Senator (now President) Obama and whose pastor expressed support for him.⁷ Another target is the Grace Community Church of Houston, Texas, whose pastor endorsed congressional hopeful Shelley Sekula Gibbs on the pastor's personal stationery.⁸

At issue is whether these churches have violated the conditions of maintaining their federal income tax exemption under section 501(c)(3) of the Internal Revenue Code (the "Code"). Code § 501(c)(3) grants exemption from federal income taxation to an educational, religious, or other charitable organization only if it does not participate or intervene in "any political campaign on behalf of (or in opposition to) any candidate for public office."⁹ Similar statutory language forecloses political campaign-related

4. For reports of the high priority that the IRS is now placing on scrutinizing the political activities of charities in general, see Bruce D. Collins, *A Click Away*, INSIDE COUNSEL, June 2007, at 79, 79 ("The word is that these political activity rules are a priority at the IRS right now."); Jocelyne Miller & Harvey Berger, *Problems at the Polls: It's Nearly Election Time—Are You Ready?*, NONPROFIT TIMES, Apr. 1, 2006, at 24, 25 ("[T]he IRS continues to prioritize enforcing the ban on political intervention."); Elizabeth Schwinn, *Ban Unclear, Congressional Report Says*, CHRON. PHILANTHROPY (Wash., D.C.), Mar. 8, 2007, at 35, 35 (stating that the IRS "began stricter enforcement of the ban" in 2004).

5. See *Obama Church Speech Probed*, L.A. TIMES, Feb. 27, 2008, at 14; J. Bennett Guess, *Obama's General Synod Speech Prompts IRS to Investigate UCC's Tax-Exempt Status*, <http://www.ucc.org/news/obama-speech-in-2007-prompts-1.html>. The IRS subsequently determined that the church had not violated the requirements for maintaining federal income tax exemption. See *IRS Ends Probe of UCC on Obama Talk, Clears Pastor on Huckabee Endorsement*, CHRISTIAN CENTURY, June 17, 2008, at 16 [hereinafter *IRS Ends Probe*].

6. See Dave McKibben, *Pastor's Endorsement of Candidate Probed*, L.A. TIMES, Feb. 14, 2008, at 5. As in the case of Obama's denomination, the IRS eventually concluded that Drake's church had not violated the requirements for maintaining federal income tax exemption. See *IRS Ends Probe*, *supra* note 5, at 16.

7. See Press Release, Americans United for Separation of Church and State, Americans United Asks IRS to Investigate Nevada Church that Endorsed Obama (Jan. 16, 2008), available at <http://www.au.org/site/News2?abbr=pr&page=NewsArticle&id=9613>.

8. See Jack Douglas Jr., *Group Asks IRS to Look at Pastor's Endorsement*, FORT WORTH STAR-TELEGRAM, March 7, 2008, at B7.

9. I.R.C. § 501(c)(3) (2006). Section 501(c)(3) organizations include only the following: corporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or

activities by churches and other charities that desire to receive contributions from donors who deduct their charitable donations from gross income in computing their federal taxable income.¹⁰ The ban¹¹ applies not only to an organization's financial contributions to or on behalf of a candidate, but also to an entity's speech.¹²

The IRS interprets the ban very broadly. According to the IRS, the ban prohibits strictly internal communications from a religious leader to church members. For example, the agency applies the ban to remarks made in a Sunday sermon¹³ or at an annual meeting,¹⁴ as well as to communications from a leader to members in a church newsletter—even when the leader personally pays for space and emphasizes that the

to foster national or international amateur sports competition (but only if no part of its activities involve the provision of athletic facilities or equipment), or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual, no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation (except as otherwise provided in subsection (h)), and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office. *Id.*

10. I.R.C. § 170(c)(2)(D) (2006). Section 170(a)(1) authorizes a deduction for a “charitable contribution,” which is defined in § 170(c). Under § 170(c)(2), a “charitable contribution” includes a gift to a “corporation, trust, or community chest, fund, or foundation” that satisfies certain requirements. I.R.C. § 170(c)(2). Such requirements include those set forth in § 501(c)(3), including the prohibition of engaging in electoral politics. *See* I.R.C. § 170(c)(2)(A)-(D).

11. This Article refers to the prohibition on political campaign participation by charities that is set forth in § 501(c)(3) as the “ban,” notwithstanding that, strictly speaking, a charity willing to forgo tax exemption and the receipt of tax-deductible donations is not prohibited from electioneering under the Code.

12. *See* I.R.C. § 501(c)(3) (stating that participation or intervention in a political campaign includes “the publishing or distributing of statements”).

13. *See* INTERNAL REVENUE SERV., PUB. NO. 1828, TAX GUIDE FOR CHURCHES AND RELIGIOUS ORGANIZATIONS 8 (rev. 2008) (Example 4) [hereinafter PUB. 1828], available at <http://www.irs.gov/pub/irs-pdf/p1828.pdf>. The most highly publicized IRS investigation of a church for the content of a sermon preached in its sanctuary involved the All Saints Episcopal Church of Pasadena, California. For reports of the sermon and the ensuing controversy with the IRS, see Patricia Ward Biederman & Jason Felch, *Antiwar Sermon Brings IRS Warning*, L.A. TIMES, Nov. 7, 2005, at A1; Alan Cooperman, *IRS Reviews Church's Status*, WASH. POST, Nov. 19, 2005, at A3; Vincent J. Schodolski, *Political Sermons Stir up the IRS*, CHI. TRIB., Nov. 20, 2005, at C11; *Taxing an Unfriendly Church*, N.Y. TIMES, Nov. 22, 2005, at A22. Ultimately, the IRS found that the church had improperly engaged in electioneering, but merely admonished the church formally. *See* Rebecca Trounson, *IRS Ends Church Probe But Stirs New Questions*, L.A. TIMES, Sept. 24, 2007, at A1.

14. *See* Rev. Rul. 2007-41, 2007-25 I.R.B. 1421 (Situation 6), available at <http://www.irs.gov/pub/irs-irbs/irb07-25.pdf>. Perhaps the most famous investigation of a § 501(c)(3) entity for remarks addressed to members attending an annual meeting centered around a speech made by the President of the National Association for the Advancement of Colored People (NAACP) at its annual convention. *See* Mike Allen, *NAACP Faces IRS Investigation*, WASH. POST, Oct. 29, 2004, at A8; Lisa Getter, *The Race for the White House; IRS Investigates NAACP for Criticism of President*, L.A. TIMES, Oct. 29, 2004, at A23; *Is the IRS Policing Free Speech?*, CHI. TRIB., Nov. 6, 2004, at C28; Michael Janofsky, *Citing Speech, I.R.S. Decides to Review N.A.A.C.P.*, N.Y. TIMES, Oct. 29, 2004, at A12. The IRS ultimately found no violation of § 501(c)(3). *See* *IRS: NAACP Speech Didn't Hurt Tax Status*, CHI. TRIB., Sept. 1, 2006, at C9.

views expressed are strictly personal.¹⁵ The IRS also maintains that a church may violate the ban without expressly endorsing or opposing a candidate. To illustrate, official IRS guidance implies that hosting a “candidate forum” in which candidates are asked to address only a narrow range of issues of primary interest to the church may violate the ban.¹⁶ Similarly, IRS guidance suggests that a church which purports to engage only in issue advocacy may in some circumstances violate the ban if it focuses only on a narrow range of issues of primary interest to the church, rather than a broad range of issues of interest to the general public.¹⁷

Scholars have debated numerous rationales for the ban on electioneering by charities in general, and churches in particular.¹⁸ The narrow but intriguing purpose of

15. See PUB. 1828, *supra* note 13, at 8 (Example 3).

16. See Rev. Rul. 2007-41, 2007-25 I.R.B. 1421 (stating that a relevant factor in determining if a church violates the ban by hosting a candidate forum is whether “the topics discussed by the candidates cover a broad range of issues that the candidates would address if elected to the office sought and are of interest to the public”); PUB. 1828, *supra* note 13, at 10 (same).

17. The IRS has long recognized that issue advocacy can function as express advocacy for or opposition to a political candidate. See, e.g., Rev. Rul. 2007-41, 2007-25 I.R.B. 1421 (stating that charities “must avoid any issue advocacy that functions as political campaign intervention”); Rev. Rul. 78-248, 1978-1 C.B. 154, *available at* <http://www.irs.gov/pub/irs-tege/rr78-248.pdf> (ruling that an organization which widely distributes information about candidates’ voting records on only one or a few issues considered important by the charity violates the ban, even if the charity does not expressly support or oppose any candidate; reasoning that, although “the guide may provide the voting public with useful information,” its purpose is partisan because of “its emphasis on one area of concern”). The IRS has found no violation of the ban when an organization distributes records of congressional representatives on a narrow range of issues, if the distribution is not widespread and is not targeted to coincide with elections. See Rev. Rul. 80-282, 1980-2 C.B. 178, *available at* <http://www.irs.gov/pub/irs-tege/rr80-282.pdf>. The IRS maintains that the following are “key factors” in determining whether a charity has violated the ban when it engages in issue advocacy: (1) “Whether the statement identifies one or more candidates for a public office”; (2) “Whether the statement expresses approval or disapproval of one or more candidates’ positions and/or actions”; (3) Whether the organization delivers the statement close in time to the election; (4) Whether the statement refers to voting or an election; (5) Whether the statement relates to an issue that “has been raised as an issue distinguishing candidates for a public office”; (6) “Whether the communication is part of an ongoing series of communications by the organization on the same issue” that are timed according to an election; and (7) “Whether the timing of the communication and identification of the candidate are related to a non-electoral event such as a scheduled vote on specific legislation by an officeholder who also happens to be a candidate for public office.” Rev. Rul. 2007-41, 2007-25 I.R.B. 1421.

18. See, e.g., Eric J. Ablin, *The Price of Not Rendering to Caesar: Restrictions on Church Participation in Political Campaigns*, 13 NOTRE DAME J.L. ETHICS & PUB. POL’Y 541 (1999); Johnny Rex Buckles, *Is the Ban on Participation in Political Campaigns by Charities Essential to their Vitality and Democracy? A Reply to Professor Tobin*, 42 U. RICH. L. REV. 1057 (2008) [hereinafter Buckles, *A Reply*]; Johnny Rex Buckles, *Not Even a Peep? The Regulation of Political Campaign Activity by Charities through Federal Tax Law*, 75 CIN. L. REV. 1071 (2007) [hereinafter Buckles, *Not Even a Peep?*]; Wilfred R. Caron & Deirdre Dessingue, *I.R.C. § 501(c)(3): Practical and Constitutional Implications of “Political” Activity Restrictions*, 2 J.L. & POL. 169 (1985); Anne Berrill Carroll, *Religion, Politics, and the IRS: Defining the*

this Article is to analyze one rationale sometimes offered in favor of the ban: it fosters a healthy separation of church and state.¹⁹ The thesis of this Article is that the norm of separation of church and state²⁰ does not justify the ban.

Limits of Tax Law Controls on Political Expression by Churches, 76 MARQ. L. REV. 217 (1992); Laura Brown Chisolm, *Politics and Charity: A Proposal for Peaceful Coexistence*, 58 GEO. WASH. L. REV. 308 (1990); Deirdre Dessingue, *Prohibition in Search of a Rationale: What the Tax Code Prohibits; Why; to What End?*, 42 B.C. L. REV. 903 (2001); Alan L. Feld, *Rendering unto Caesar or Electioneering for Caesar? Loss of Church Tax Exemption for Participation in Electoral Politics*, 42 B.C. L. REV. 931 (2001); Edward McGlynn Gaffney, Jr., *On Not Rendering to Caesar: The Unconstitutionality of Tax Regulation of Activities of Religious Organizations Relating to Politics*, 40 DEPAUL L. REV. 1, 29–39 (1990); Richard W. Garnett, *A Quiet Faith? Taxes, Politics, and the Privatization of Religion*, 42 B.C. L. REV. 771 (2001); Steffen N. Johnson, *Of Politics and Pulpits: A First Amendment Analysis of IRS Restrictions on the Political Activities of Religious Organizations*, 42 B.C. L. REV. 875 (2001); Chris Kemmitt, *RFRA, Churches and the IRS: Reconsidering the Legal Boundaries of Church Activity in the Political Sphere*, 43 HARV. J. ON LEGIS. 145 (2006); Randy Lee, *When a King Speaks of God; When God Speaks to a King: Faith, Politics, Tax Exempt Status, and the Constitution in the Clinton Administration*, 63 LAW & CONTEMP. PROBS. 391 (2000); Ann M. Murphy, *Campaign Signs and the Collection Plate—Never the Twain Shall Meet?*, 1 PITT. TAX REV. 35 (2003); Patrick L. O'Daniel, *More Honored in the Breach: A Historical Perspective of the Permeable IRS Prohibition on Campaigning by Churches*, 42 B.C. L. REV. 733 (2001); Donald B. Tobin, *Political Campaigning by Churches and Charities: Hazardous for 501(c)(3)s, Dangerous for Democracy*, 95 GEO. L.J. 1313 (2007); Mark Totten, *The Politics of Faith: Rethinking the Prohibition on Political Campaign Intervention*, 18 STAN. L. & POL'Y REV. 298 (2007); Ellis M. West, *The Free Exercise Clause and the Internal Revenue Code's Restrictions on the Political Activity of Tax-Exempt Organizations*, 21 WAKE FOREST L. REV. 395 (1986); Joel E. Davidson, Note, *Religion in Politics and the Income Tax Exemption*, 42 FORDHAM L. REV. 397 (1974); Joseph S. Klapach, Note, *Thou Shall not Politic: A Principled Approach to Section 501(c)(3)'s Prohibition of Political Campaign Activity*, 84 CORNELL L. REV. 504 (1999); Judy Ann Rosenblum, Note, *Religion and Political Campaigns: A Proposal to Revise Section 501(c)(3) of the Internal Revenue Code*, 49 FORDHAM L. REV. 536 (1981); Kelly S. Shoop, Note, *If You Are a Good Christian You Have No Business Voting for this Candidate: Church Sponsored Political Activity in Federal Elections*, 83 WASH. U. L.Q. 1927 (2005).

19. See, e.g., *Christian Echoes Nat'l Ministry, Inc. v. United States*, 470 F.2d 849, 857 (10th Cir. 1972) (opining that the ban is “justified in keeping with the separation and neutrality principles”); Oliver A. Houck, *On the Limits of Charity: Lobbying, Litigation, and Electoral Politics by Charitable Organizations Under the Internal Revenue Code and Related Laws*, 69 BROOK. L. REV. 1, 88 (2003) (stating that “separationists appear to be in a clear, if more passive, majority” in America, and that, for many citizens, “the thought of unleashing churches for all-out lobbying and electioneering may be reason enough to oppose any relaxation of the 501(c)(3) restrictions”); Benjamin S. De Leon, Note, *Rendering a Taxing New Tide on I.R.C. 501(c)(3): The Constitutional Implications of H.R. 2357 and Alternatives for Increased Political Freedom in Houses of Worship*, 23 REV. LITIG. 691, 693 (2004) (supporting the ban because “[c]hurch and state must remain separate to serve the interests of religious freedom and societal pluralism”); Shoop, *supra* note 18, at 1928 (describing the ban as “one of the federal government’s current means of ensuring church-state separation”); Douglas, *supra* note 8, at B7 (characterizing the ban as “a federal law separating church and state”). One scholar opines that the “driving force behind the current interpretation, application, and enforcement” of the ban as applied to churches is the separation norm. Jennifer M. Smith, *Morse Code, Da Vinci Code, Tax Code and . . . Churches: An Historical and Constitutional Analysis of Why Section 501(c)(3) Does Not Apply to Churches*, 23 J.L. & POL. 41, 63 (2007).

Although the arguments that invoke the separation norm to support the ban vary, one may articulate four major versions. The first two variants argue that the Constitution subsumes or compels the ban, and the second two invoke the separation norm to justify the ban as sound policy, but not one that is constitutionally compelled. Under the first and most extreme version of the argument, the ban is justifiable as applied to churches because it merely penalizes conduct that the Establishment Clause²¹ prohibits. According to this theory, the separation norm, as implemented through the Establishment Clause, prohibits churches from engaging in electioneering. This Article refers to this theory as “Constitutional Hyper-Separationism.”

A second iteration of the argument theorizes that the federal government is constitutionally prohibited from *subsidizing* electioneering by religious organizations. Under this view, the separation norm, as implemented through the Establishment Clause, compels the ban, for without the ban government would be unconstitutionally subsidizing religiously impelled, partisan political speech. This Article refers to this theory as “Subsidy-Based Constitutional Separationism.”

A third version of the argument maintains that the federal government should not subsidize electioneering by religious organizations, although it is free to do so under the Constitution. Thus, exclusively as a matter of sound public policy, the separation norm counsels in favor of the ban. This Article refers to this theory as “Subsidy-Based Normative Separationism.”

A fourth and final genus of the argument justifies the ban without relying on the premise that tax exemption constitutes a governmental subsidy. Under this theory, regardless of whether § 501(c)(3) subsidizes religious political discourse, the federal government should discourage electioneering by religious organizations via the ban. However, this view acknowledges that the government is not compelled to suppress any form of religious political discourse under the Constitution. Purely as a matter of policy, the separation norm counsels in favor of the ban. This Article refers to this theory as “Normative Hyper-Separationism.”

This Article evaluates each major separationist argument by identifying its most significant assumptions, analyzing the plausibility of those assumptions, and discussing the constitutional, statutory, and administrative law most relevant to each argument in the context of its assumptions. This Article concludes that no variation of the separationism argument justifies the ban, and explains the most significant policy implications of this analysis.

I. CONSTITUTIONAL HYPER-SEPARATIONISM

The argument that the separation norm, as implemented through the Establishment Clause, categorically prohibits religious organizations from engaging in certain forms

20. The phrase “separation of church and state” of course carries a variety of meanings. See Douglas Laycock, *The Many Meanings of Separation*, 70 U. CHI. L. REV. 1667, 1700–01 (2003). As used in this Article “separation of church and state” loosely refers to the norm, reflected in the Religion Clauses of the First Amendment and judicial opinions interpreting the same, that government must not, under color of law, sponsor or control the religious affairs of individuals or organizations, and religious organizations must not possess, under color of law, the right to control government action.

21. U.S. CONST. amend. I (“Congress shall make no law respecting an establishment of religion . . .”).

of religious discourse—such as expressions of support for identified candidates—is perhaps the most extreme view that could be advanced in favor of the ban.²² Under this radical notion of separation of church and state, the ban merely imposes a monetary sanction (loss of federal income tax exemption and sacrifice of the ability to receive tax-deductible donations) for activity that the Constitution already forbids. In other words, Constitutional Hyper-Separationism holds that the Establishment Clause prohibits even churches that elect to forgo tax exemption under § 501(c)(3) from endorsing or opposing political candidates. Although this position would likely strike most scholars as highly objectionable,²³ explaining why this notion of separation of church and state is misguided is nonetheless important. This position lays a foundation for analyzing other, more plausible, positions in favor of the ban.

The most serious shortcoming of Constitutional Hyper-Separationism is its assumption that the Establishment Clause can limit the action of private persons and entities acting completely independently of the state, rather than conduct or speech attributable to the government. As Professor Douglas Laycock has observed, both the structure of the Bill of Rights and the text of the First Amendment plainly compel the conclusion that the Establishment Clause limits government, not private religious actors.²⁴ Hence, the Establishment Clause prevents government speech that advances religion, but not private religious speech, which is protected by the First Amendment.²⁵

22. A less extreme variant of the argument is that the Establishment Clause does not prohibit religious organizations from engaging in partisan political speech, but neither does the Free Exercise Clause protect the right of churches to engage in such speech. Under this approach, government is permitted, but not required, to silence election-related speech by churches in order to advance the separation norm. Because this position relies on essentially the same assumptions analyzed in the discussion of Normative Hyper-Separationism, *see infra* text accompanying notes 119–76, this Article need not separately discuss this position.

23. *See, e.g.*, Dessingue, *supra* note 18, at 916 (“Although the political activity prohibition may coincide with the strict separationist view, it is not constitutionally mandated.”). Indeed, Professor Edward McGlynn Gaffney, Jr. has argued that a statute prohibiting “political campaign activity by a religious community” would violate the First Amendment’s protection of free speech and the free exercise of religion. Gaffney, *supra* note 18, at 30. *See generally* U.S. CONST. amend I (“Congress shall make no law . . . prohibiting the free exercise [of religion]; or abridging the freedom of speech . . .”). To argue that the First Amendment protects the religious political speech of churches against governmental suppression is to reject the view that the Establishment Clause requires government to suppress the religious political speech of churches.

24. Laycock explains this point as follows:

The First Amendment limits the power of government, not the rights of churches. This is explicit in the constitutional text and inherent in the constitutional structure; all the provisions in the Bill of Rights protect the people from the government, not the government from the people. State action plays a further and unique role in the Religion Clauses: State action is the difference between government religious activity, restricted by the Establishment Clause, and private religious activity, explicitly protected by the Free Exercise Clause.

Laycock, *supra* note 20, at 1671–72 (2003); *see also id.* at 1672 (stating that to conceive of separation of church and state “as restricting church as much as state” is to advance a concept that is “utterly alien to the First Amendment,” notwithstanding that “there are Americans who use separation to restrict churches”).

25. *See, e.g.*, Bd. of Educ. of Westside Cmty. Sch. (Dist. 66) v. Mergens, 496 U.S. 226, 250

Certainly, the Supreme Court has held that when government sponsors a strictly limited forum (such as a football game²⁶ or graduation ceremony²⁷), the religious speech of a private individual can sometimes be attributed to government. In such situations, the government has been held to violate the Establishment Clause by fostering or directing the religious speech of the private actor.²⁸ However, when government has sponsored a limited or traditional *public* forum—one made available to many users for a wide range of uses—in several cases the religious speech and conduct of a private actor has not been attributed to government. For example, in the context of a limited or traditional public forum, the Establishment Clause does not prohibit the use of school facilities by private groups for Bible study, prayer, and worship;²⁹ the after-hours use of public schools by a church showing films on child-rearing from a religious perspective;³⁰ or the payment by a public university of the costs of publishing a student group's newspaper written from a Christian perspective.³¹

Plainly, governmental sponsorship of a limited forum for a wide range of uses (including religious uses) by private actors has been held not to violate the Establishment Clause. Accordingly, it is inconceivable that the Constitution should be interpreted to prohibit government from permitting every person and entity in the country, including religious organizations, to use the ultimate, metaphysical public forum sponsored by government—the marketplace of ideas springing from freedom of expression. When people, acting on behalf of themselves or together through an organization, express views that are both religious and political, they are merely availing themselves of the infrastructure of a liberal democracy. Government's fostering of the forum of free expression to all, including churches that desire to engage in religious political discourse, can hardly be said to contravene the separation norm.³²

Indeed, quite the opposite is true. Were government to prohibit the religious political speech of churches but not the political speech of non-religious entities, government would commit a classic violation of the First Amendment. Such action would be patently non-neutral towards speech and religion.³³ The Establishment Clause has long been held to require, at a minimum, government neutrality between religion and non-religion.³⁴ Moreover, when government targets a religious practice, the Free

(1990) (O'Connor, J., plurality opinion) (holding that a federal law requiring equal access to school facilities by student groups meeting after school did not violate the Establishment Clause).

26. See *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 301–10 (2000).

27. See *Lee v. Weisman*, 505 U.S. 577, 586–90 (1992).

28. See *Santa Fe Indep. Sch. Dist.*, 530 U.S. at 316–17; *Weisman*, 505 U.S. at 599.

29. See *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 112–19 (2001); *Widmar v. Vincent*, 454 U.S. 263, 270–75 (1981).

30. See *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 394–96 (1993).

31. See *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 838–46 (1995).

32. Cf. Laycock, *supra* note 20, at 1678 (observing that “some people have inferred from separation a ban on religion addressing politics,” but contending that “this inference is erroneous as an interpretation of the First Amendment”).

33. See *Bd. of Educ. of Westside Cmty. Sch. (Dist. 66) v. Mergens*, 496 U.S. 226, 249 (1990) (O'Connor, J., plurality opinion) (“[I]f a State refused to let religious groups use facilities open to others, then it would demonstrate not neutrality but hostility toward religion.”).

34. As the Court has opined,

Exercise Clause requires government to justify its action under strict scrutiny.³⁵ Similarly, censorship of only that speech which is "religious" in nature constitutes viewpoint discrimination, which itself violates the Free Speech Clause of the First Amendment³⁶ unless the government can justify its censorship under strict scrutiny.³⁷ The desire to implement the separation norm is not alone sufficient to justify burdens imposed uniquely on religious conduct and speech.³⁸ Thus, if the separation norm justifies § 501(c)(3)'s ban on electioneering by churches, it must find articulation in a theory other than Constitutional Hyper-Separationism.³⁹

II. SUBSIDY-BASED CONSTITUTIONAL SEPARATIONISM

A more promising theory is Subsidy-Based Constitutional Separationism, which reasons that the Establishment Clause (informed by the separation norm) prohibits the federal government from subsidizing electioneering by religious organizations.⁴⁰ Subsidy-Based Constitutional Separationism is based on the following assumptions: (1) the tax benefits conferred upon religious entities, directly under Code § 501(c)(3) and indirectly under Code § 170, constitute governmental subsidies to religion for purposes of constitutional law; and (2) subsidizing the electioneering of religious entities violates the Establishment Clause, as informed by the separation norm.

Assumption (1) finds support in several judicial opinions, although that support is qualified, especially in the context of the Court's Establishment Clause jurisprudence. Perhaps most famously, in *Regan v. Taxation with Representation*,⁴¹ the Court upheld the constitutionality of a provision akin to the ban—the requirement of Code §

Government in our democracy, state and national, must be neutral in matters of religious theory, doctrine, and practice. It may not be hostile to any religion or to the advocacy of non-religion; and it may not aid, foster, or promote one religion or religious theory against another or even against the militant opposite. The First Amendment mandates governmental neutrality between religion and religion, and between religion and non-religion.

Epperson v. Arkansas, 393 U.S. 97, 103–04 (1968).

35. See, e.g., *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 542, 545–47 (1993) (holding that a city ordinance aimed at forbidding ritual animal sacrifice violated the Free Exercise Clause because it was non-neutral and was not narrowly tailored to advance a compelling governmental interest).

36. See *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 393–95 (1993); *Members of the City Council v. Taxpayers for Vincent*, 466 U.S. 789, 804 (1984); Douglas Laycock, *Freedom of Speech That Is Both Religious and Political*, 29 U.C. DAVIS L. REV. 793, 799 (1996) ("The Supreme Court has unanimously held that excluding religious speech from a public forum is viewpoint discrimination, and not a more defensible subject matter exclusion, at least where the speaker addresses a topic that could be addressed from a secular perspective.").

37. See *Widmar v. Vincent*, 454 U.S. 263, 269–70 (1981).

38. See *id.* at 270–77 (holding that a public university's desire to ensure the separation of church and state did not justify infringement of a religious group's free speech rights when the university had created a limited public forum).

39. Cf. *Dessingue*, *supra* note 18, at 920 (stating that "an outright ban on religious speech would violate the Free Exercise Clause").

40. For an analysis, based on the subsidy theory, of why the Establishment Clause may compel the ban, see *Houck*, *supra* note 19, at 52–62.

41. 461 U.S. 540 (1983).

501(c)(3) that “no substantial part” of the activities of a tax-exempt charity consist of “carrying on propaganda, or otherwise attempting to influence legislation.”⁴² In so holding, the Court relied on the theory that both federal income tax advantages enjoyed by § 501(c)(3) organizations (i.e., tax exemption and the ability to receive tax-deductible contributions) are a form of governmental subsidy.⁴³ Similarly, in *Bob Jones University v. United States*,⁴⁴ the Court opined that Code §§ 501(c)(3) and 170 reflect a congressional desire “to provide tax benefits to organizations serving charitable purposes” that serve public ends.⁴⁵ Finally, in *Texas Monthly, Inc. v. Bullock*,⁴⁶ which found a violation of the Establishment Clause by a state sales tax exemption for sales of religious periodicals,⁴⁷ the Court stated that “[e]very tax exemption constitutes a subsidy.”⁴⁸ Under this line of cases, the first assumption of Subsidy-Based Constitutional Separationism seems plausible.

However, this line of cases does not exhaust the relevant Supreme Court precedent. In *Walz v. Tax Commission of New York*,⁴⁹ the Court held that granting property tax exemption to religious organizations (among other types of charitable entities) did not violate the Establishment Clause.⁵⁰ The *Walz* Court acknowledged that tax exemption conferred an “indirect economic benefit” on religious entities,⁵¹ but distinguished this benefit from direct subsidies:

The grant of a tax exemption is not sponsorship since the government does not transfer part of its revenue to churches but simply abstains from demanding that the church support the state. No one has ever suggested that tax exemption has converted libraries, art galleries, or hospitals into arms of the state or put employees “on the public payroll.” There is no genuine nexus between tax exemption and establishment of religion. . . . The exemption creates only a minimal and remote involvement between church and state and far less than taxation of churches. It restricts the fiscal relationship between church and state, and tends to complement and reinforce the desired separation insulating each from the other.⁵²

Walz significantly undermines the first assumption of Subsidy-Based Constitutional Separationism. Under *Walz*, to grant tax exemption to a religious entity is not tantamount to directly funding the religious entity. In other words, for purposes of the

42. *Id.* at 544–51; see also I.R.C. § 501(c)(3) (2006).

43. *Regan*, 461 U.S. at 544 (“Both tax exemptions and tax-deductibility are a form of subsidy that is administered through the tax system. A tax exemption has much the same effect as a cash grant to the organization of the amount of tax it would have to pay on its income.”).

44. 461 U.S. 574 (1983) (upholding the revocation of tax-exempt status from a private school that maintained an admissions policy forbidding interracial dating, reasoning that the prohibition violated “fundamental public policy”).

45. *Id.* at 587.

46. 489 U.S. 1 (1988) (Brennan, J., plurality opinion).

47. See *id.* at 25.

48. *Id.* at 14.

49. 397 U.S. 664 (1970).

50. See *id.* at 679–80.

51. *Id.* at 674.

52. *Id.* at 675–76.

Establishment Clause, *Walz* rejects any reconstruction of a decision not to tax as the functional equivalent of (1) a decision to tax, followed by (2) a direct governmental grant of the money deemed to have been collected through the tax in step (1). The refusal of *Walz* to equate tax exemption with a direct grant of imputed tax revenues merely makes explicit what is implicit in the common statutory approach of not taxing numerous forms of nonprofit organizations, including churches.

For example, if Code § 501(c)(3) did not implicitly rely on the analytical framework embraced in *Walz*, then the refusal of the government to tax the income of churches would be tantamount to the direct funding of churches by government with dollars deemed to have been paid into the public treasury. Further, absent the *Walz* framework, because the statutory basis for which a church receives tax exemption under § 501(c)(3) is that it is organized and operated for religious purposes, the government would be considered to have conditioned the deemed grant to churches upon their advancing a religious purpose. A government grant of tax receipts to a church, to be used by the church for whatever religious purposes it may select, is akin to one of the most egregious types of establishment of religion that the Constitution has long been understood to prohibit.⁵³ However, tax exemptions of church income and property throughout our nation's history have been common—the rule, rather than the exception.⁵⁴ That such exemptions have not been held to violate the separation norm, at least when they are broadly framed to exempt from taxation the income and property of numerous nonprofit entities (including churches), suggests that the *Walz* framework enjoys long-standing implicit acceptance.

There is one limitation to the logical reach of *Walz*. In *Walz*, the tax exemption enjoyed by churches applied broadly to many types of entities. *Texas Monthly, Inc. v. Bullock*⁵⁵ assigns pivotal significance to this fact.⁵⁶ The plurality opinion in *Texas Monthly* found a violation of the Establishment Clause where the statute in question exempted not a broad class of products from sales tax, but only religious literature.⁵⁷ The precise degree to which *Texas Monthly* limits the logical application of *Walz* is unknown. However, there is no persuasive reason to question the applicability of *Walz* to the federal income tax exemption of churches under Code § 501(c)(3). Code § 501(c)(3) exempts a broad class of entities organized not only for religious but also for

53. See *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 840 (1995) (stating that a tax imposed specifically to establish specific sects “would run contrary to Establishment Clause concerns dating from the earliest days of the Republic”); *id.* at 868–72 (Souter, J., dissenting) (tracing the historical foundations of the Establishment Clause and observing that it was intended to prohibit direct financial aid to churches from public monies); *Everson v. Bd. of Educ.*, 330 U.S. 1, 8–16 (1947) (discussing the history of imposing taxes for the support of religion and the ensuing commitment to end the practice in the anti-establishment movement that resulted in the Establishment Clause); *id.* at 16 (opining that a state cannot constitutionally “contribute tax-raised funds to the support of an institution which teaches the tenets and faith of any church”).

54. See *Rosenberger*, 515 U.S. at 859 (Thomas, J., concurring) (“The historical evidence of government support for religious entities through property tax exemptions is also overwhelming.”); *Walz*, 397 U.S. at 676–80.

55. 489 U.S. 1 (1988).

56. See *id.* at 11–17.

57. See *id.* at 14–15.

general charitable, educational, scientific, literary, and other purposes.⁵⁸ Just as the property tax exemption in *Walz* applied broadly, so does § 501(c)(3) (and, more generally, § 501(c) as a whole).⁵⁹

Before leaving the discussion of *Walz*, this Article would do well to explore why *Walz*'s refusal to equate tax exemption with a deemed transfer of taxes to government followed by a deemed grant from government to a church is not only historically assumed, but also theoretically correct. One theoretical justification for *Walz* is that the element of private choice negates any finding of governmental sanction of religion through the indirect funding mechanism, at least when the class of exempt entities is broad. Under the typical system of ad valorem taxation,⁶⁰ the benefit of a property tax exemption obviously varies with the value of property exempted from tax; the greater the value of the property owned by a church, the greater the tax bill that the church avoids by virtue of its exemption. However, government is not primarily responsible for the existence or value of a church's property.⁶¹ Those who donate the property (and cash used to purchase property) owned by a church, as well as the church leaders and members who decide how much cash to invest in church land and buildings, are the people most directly responsible for the existence and value of church property, for their decisions largely dictate just what property a church owns. The government has no voice in determining what churches own property, or how much property they own. Of course, the forces of the market also determine the value of all real property, including that owned by churches. Even so, private persons, including church leaders and members of congregations, rather than governmental actors, decide where churches should locate and therefore serve a role in determining how the market will value their property. Moreover, the market is largely a function of private choices, not governmental choices. Hence, at least as long as the government imposes broadly applicable property tax exemptions, the value of the exemption to churches is largely the result of private choices, not governmental action.⁶²

That the value of property tax exemption to churches is largely the result of private choices is important under the Court's Establishment Clause jurisprudence. The significance of private choice is nicely illustrated by *Mueller v. Allen*,⁶³ a case analogous to *Walz*. In *Mueller v. Allen*, the Court upheld the constitutionality of a state

58. I.R.C. § 501(c)(3) (2006).

59. Similarly, the language of Code § 170(c) defines "charitable contribution" in such a way that donations to a broad class of organizations are deductible. See I.R.C. § 170(c) (2006).

60. "Ad valorem" means "according to value." BLACK'S LAW DICTIONARY 57 (8th ed. 2004). Ad valorem taxes, of which real property taxes are representative, increase as the property subject to taxation increases in value.

61. Cf. DEAN M. KELLEY, WHY CHURCHES SHOULD NOT PAY TAXES 32-34 (1977) (discussing the difference between a direct subsidy and tax exemptions in terms of governmental involvement; observing that government determines the amount of a subsidy, but does not determine the value of tax exemption to an organization).

62. Of course, the government does fix the rate of taxation on taxable property, and therefore the value of a property tax exemption to a church does vary with the rate that would apply in the absence of the exemption. This point is of no real consequence, however. In the "private choice" line of cases discussed in the paragraph following this note, the government played an analogous role in fixing the amount of the subsidies directed through private choice.

63. 463 U.S. 388 (1983).

income tax law permitting a deduction for payments of tuition, purchase of books, and provision of transportation made to enable the taxpayers' children to attend school, notwithstanding that parents of children attending private religious schools were most likely to claim the deduction.⁶⁴ One reason the deduction survived Establishment Clause scrutiny is that the private schools received an indirect benefit through the tax system "only as a result of decisions of individual parents,"⁶⁵ and therefore the state had not conveyed approval of any specific religion or of religion in general.⁶⁶ Similarly, the presence of a causal link between private choices and the amount of governmental assistance enjoyed by religious entities patronized by the people exercising choices has been a significant factor in several other Supreme Court opinions finding no violation of the Establishment Clause.⁶⁷ The Court's opinion in *Zelman v. Simmons-Harris*⁶⁸ aptly captures the point:

[W]here a government aid program is neutral with respect to religion, and provides assistance directly to a broad class of citizens who, in turn, direct government aid to religious [institutions] . . . wholly as a result of their own genuine and independent private choice, the program is not readily subject to challenge under the Establishment Clause. A program that shares these features permits government aid to reach religious institutions only by way of the deliberate choices of numerous individual recipients. The incidental advancement of a religious mission, or the perceived endorsement of a religious message, is reasonably attributable to the individual recipient, not to the government, whose role ends with the disbursement of benefits.⁶⁹

The application of these cases to the tax exemption of churches under Code § 501(c)(3) and their ability to receive contributions deductible by donors under Code § 170 is patent. The benefit of tax exemption under Code § 501(c)(3) and the indirect benefit of receiving tax-deductible contributions under Code § 170 are primarily the result of private choices. Private, not governmental, actors decide how much to donate to churches. Similarly, church leaders and members make other choices that have a

64. *See id.* at 394–404.

65. *Id.* at 399; *see also id.* at 400 (stating that the "historic purposes" of the Establishment Clause "simply do not encompass the sort of attenuated financial benefit, ultimately controlled by the private choices of individual parents," that inured to parochial schools from a neutrally available state income tax deduction).

66. *See id.* at 399.

67. *See, e.g., Zelman v. Simmons-Harris*, 536 U.S. 639, 644, 652–54, 662–63 (2002) (upholding the constitutionality of a governmentally funded school voucher program enabling students to attend private schools of their choice); *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 10, 13–14 (1993) (finding that a governmental program requiring a school district to provide sign-language interpreters to help deaf students did not violate the Establishment Clause even when a deaf student was enrolled in a private Catholic school; relying in part on the fact that the choice of school was made by the student's parents, rather than the government); *Witters v. Wash. Dep't of Servs. for the Blind*, 474 U.S. 481, 487–89 (1986) (finding no Establishment Clause violation by a state scholarship program that aided a student studying for the ministry at a religious institution where any benefit realized by the religious entity resulted from the student's private, independent choice).

68. 536 U.S. 639 (2002).

69. *Id.* at 652.

bearing on the income that a church receives (whether through donations, church school tuition, earnings from investments, or car washes and garage sales sponsored by youth groups). Even when the charitable contributions deduction is conceptualized as a "matching grant,"⁷⁰ the point remains that a "matching grant" arises only when a private actor first decides to donate to the church, and the amount of the "matching grant" varies with the amount that the private actor decides to donate. It is thus no surprise that the Supreme Court has strongly suggested in dictum that a state income tax law authorizing a charitable contributions deduction did not violate the Establishment Clause, notwithstanding that the deduction likely benefited religious organizations.⁷¹

Another theoretical justification for *Walz*'s refusal to equate tax exemption with a deemed transfer of taxes to government followed by a deemed grant from government to a church is that any such reconstruction of the refusal to tax erroneously conceptualizes the normative tax base. As discussed more fully below in the context of income tax exemptions,⁷² several alternatives to the so-called "subsidy theory" may justify Code §§ 170 and 501(c)(3) as applied to the broad class of charities in general. Under these theories, no "subsidy" flows to tax-exempt entities by virtue of their exempt status because the income in question is not properly included in the tax base in the first instance. One may similarly argue that *Walz* is theoretically sound because the property owned by charitable organizations, including churches, is not properly included in the tax base. Support for this view appears in Professor Evelyn Brody's "sovereignty" theory of charity tax exemptions.⁷³ Professor Brody explains that charities historically have been regarded as limited co-sovereigns with the state.⁷⁴ Because they are qualified co-sovereigns,⁷⁵ charitable entities generally have been viewed by governmental authorities as improper objects of taxation. From this perspective, when government "exempts" property owned by charitable, religious, and educational institutions from taxation, it does so not to subsidize charity, but to recognize charity's sovereign prerogative to operate free from governmental intrusion.

Indeed, one can even justify *Walz* more particularly as it applies to churches alone. Relying in part on Professor Brody's theory of exemptions based on sovereignty, Professor Edward Zelinsky has argued that the most appealing justification for *Walz* is that the value of property owned by churches does not belong in the normatively correct tax base.⁷⁶ Zelinsky observes that the nation's founders were "simultaneously

70. See, e.g., Edward H. Rabin, *Charitable Trusts and Charitable Deductions*, 41 N.Y.U. L. REV. 912, 920 (1966) ("In essence, the present system is a type of matching program under which the Government agrees to spend a certain amount (depending on the taxpayer's top tax bracket) for each dollar contributed to charity.").

71. See *Mueller v. Allen*, 463 U.S. 388, 396 n.5 (1983).

72. See *infra* text accompanying notes 92–113.

73. See Evelyn Brody, *Of Sovereignty and Subsidy: Conceptualizing the Charity Tax Exemption*, 23 J. CORP. L. 585 (1998).

74. See *id.* at 585–96.

75. Charities are "qualified" co-sovereigns because, as Professor Brody argues, the state views charities with suspicion and is unwilling to recognize their co-sovereignty for all purposes of law. See *id.* at 629.

76. See Edward A. Zelinsky, *Are Tax "Benefits" for Religious Institutions Constitutionally Dependent on Benefits for Secular Entities?*, 42 B.C. L. REV. 805, 811–12, 836–41 (2001).

propounding separationism and exemption,”⁷⁷ and he explains this fact by reasoning that the founders “thought of exemption as a form of separationism, in our vocabulary, a recognition of sectarian autonomy.”⁷⁸ Rather than exempting religious entities from taxation in order to subsidize them, governments “refrain from taxation as a recognition of the autonomy of religious institutions and undertakings.”⁷⁹ Zelinsky concludes that “tax exemption does not subsidize churches, but leaves them alone.”⁸⁰

Although Professor Zelinsky’s arguments have considerable force,⁸¹ this Article need neither adopt nor reject his defense of tax exemptions for churches in particular (as opposed to charities more generally). The important point for present purposes is that *Walz*’s distinction between direct subsidies and the benefit of tax exemption is defensible on at least two independent bases—the effect of private choice, and the proper conceptualization of the tax base. Consequently, the first assumption of Subsidy-Based Constitutional Separationism does not withstand scrutiny.

Assumption (2) of Subsidy-Based Constitutional Separationism suffers from an internal logical gap when offered as a constitutional justification for the ban. Certainly, if, contrary to the weight of judicial authority, Code §§ 501(c)(3) and 170 were properly conceived to impart a direct subsidy on churches for purposes of the Establishment Clause, serious concerns would arise. But those concerns extend well beyond the subsidization of the political speech of churches, a point that is easily overlooked. Consider the following reasoning offered by Professor Oliver Houck, an adherent of Subsidy-Based Constitutional Separationism:

At first blush, any attempt to separately limit churches from political activity would seem to run afoul of the neutrality principle and be unconstitutional. The cases applying this principle to date, however, have involved state support for educational and other apolitical activities. There is a major difference in empowerment between allowing religious groups to meet after-hours at a public school, and subsidizing a church slate of political candidates. The subsidy is large, and the activity goes to the heart of democratic government.⁸²

On close inspection, the argument proves too much.⁸³

77. *Id.* at 840.

78. *Id.*

79. *Id.* at 841.

80. *Id.*

81. Professor Carl Esbeck supports the same analysis when he reasons as follows: [T]he very reason for causing religious organizations to be jurisdictionally “separated” from government is to reduce conflicts between the two and thereby to protect church autonomy. The word “exemption” is merely the legislative rubric for accomplishing that deeper purpose. Religious exemptions from regulatory or tax burdens do not violate the Establishment Clause—they reinforce the desired distance between church and state.

Carl H. Esbeck, *Dissent and Disestablishment: The Church-State Settlement in the Early American Republic*, 2004 BYU L. REV. 1385, 1586 (2004).

82. Houck, *supra* note 19, at 57.

83. As discussed below, *see infra* text accompanying notes 117–18, one may also rightly question whether the indirect government subsidy received by churches is as large as that received by many other types of charities.

The statutory basis for which a church receives tax exemption under § 501(c)(3) is that it is organized and operated for religious purposes. Thus, as a condition of obtaining tax exemption, the church must advance a religious purpose. If tax exemption is tantamount to a deemed payment of taxes by churches, followed by a deemed transfer of collected revenues from government to churches,⁸⁴ the logic of Subsidy-Based Constitutional Separationism compels the conclusion that to grant tax exemption to churches is to violate the separation norm.⁸⁵ As discussed above, the separation norm counsels against government aid to churches, at least when they can use granted funds for whatever religious projects they may select.⁸⁶

To understand the real import of the second assumption of Subsidy-Based Constitutional Separationism is to expose its Achilles' heel. Its logic essentially renders moot the more specific question of whether *lifting the ban on electioneering* itself would contravene the separation norm. Professor Houck obfuscates this issue when he contrasts "allowing religious groups to meet after-hours at a public school" with "subsidizing a church slate of political candidates."⁸⁷ In order to craft a persuasive argument against the ban along these lines, one must explain why, for purposes of the Establishment Clause, *governmental financial support* for non-political, overtly religious activities of churches is constitutional, whereas governmental financial support for political, religious speech is not. As more fully developed below,⁸⁸ the position is difficult to defend. In the final analysis, Subsidy-Based Constitutional Separationism is not so much an argument in favor of the ban, as an argument against the tax exemption of churches more generally.

In summary, the weight of Supreme Court jurisprudence defies Subsidy-Based Constitutional Separationism. For purposes of constitutional law, a church's federal income tax exemption and its receipt of tax-deductible donations are not the same as federal grants for the advancement of religion. If the separation norm justifies Code §

84. One scholar who appears to embrace the subsidy theory has, without expressing any reservations, analyzed tax exemption for churches as a substitute for government-provided religious services. She reasons as follows:

Considering the theory for tax exemption, it is clear that tax exemption should not extend to political activities. The grant of tax exemption is tied to the public service offered by the entity, service that the government need no longer provide.

The entity stands in the shoes of the government, providing religious, charitable, scientific, educational, and other services directly to the public.

See Murphy, *supra* note 18, at 80. To maintain that a church "stands in the shoes of the government" in providing religious services is peculiar. If the Establishment Clause means anything, it most surely means that government is barred from directly providing "religious services." See *Everson v. Bd. of Educ.*, 330 U.S. 1, 15–16 (1947) (stating that the Establishment Clause means that the federal government cannot "set up a church" or "participate in the affairs of any religious organizations or groups"). No constitutionally viable theory can justify tax exemption for churches on the basis that they relieve the government of its obligation to provide religious services to its citizens.

85. Cf. Gaffney, *supra* note 18, at 35 (rejecting "tax expenditure" theory as applied to churches because "under the no-establishment clause, religion is not normally a legitimate function of governmental planning or financial support").

86. See *supra* note 53 and accompanying text.

87. Houck, *supra* note 19, at 57.

88. See *infra* text accompanying notes 117–18, 155–58.

501(c)(3), it must do so pursuant to a theory articulated in general policy terms rather than one grounded strictly in constitutional law.

III. SUBSIDY-BASED NORMATIVE SEPARATIONISM

Although the tax advantages enjoyed by churches are not properly viewed as equivalent to direct governmental subsidies for purposes of the Establishment Clause, one may argue that they should be viewed as subsidies more generally, in designing and enacting public policy. The position that I have styled “Subsidy-Based Normative Separationism” argues that the federal government should not subsidize electioneering by religious organizations, although it is free to do so under the Constitution. Subsidy-Based Normative Separationism assumes the following: (1) the tax benefits conferred upon religious entities, directly under Code § 501(c)(3) and indirectly under Code § 170, should be analyzed as a governmental subsidy for purposes of federal income tax policy and theory (but not necessarily for purposes of constitutional law); and (2) sound policy, grounded in the separation norm, counsels government against subsidizing the religious political activities of religious entities. Subsidy-Based Normative Separationism appears to garner a fairly large following,⁸⁹ even finding expression in a federal judicial opinion.⁹⁰

Assumption (1) (commonly referred to as the “subsidy theory”) is widely held, or at least perceived to be widely held.⁹¹ However, the subsidy theory is hardly the only

89. See, e.g., Murphy, *supra* note 18, at 79–81; Tobin, *supra* note 18, at 1320 (framing his discussion of the ban on political campaign participation by churches in terms of “whether religious institutions should be subsidized to engage in political campaigns”); De Leon, *supra* note 19, at 715–16 (referring to “the subsidization of free expression” and arguing that “the current political-campaign-activity prohibition should remain on the books as it is written for the sake of public policy”). Professor Ann Murphy’s analysis is illustrative. After analyzing tax exemption as an indirect governmental subsidy, see Murphy, *supra* note 18, at 63–64, she reasons as follows in favor of the ban:

The lifting of the ban is not direct State support of religion, but it creates a climate in which a church could encroach on politics, and politics could encroach on the activity of a church. The intervention in politics could turn believers away from the church or house of worship. One need only envision campaign signs within a church to see the danger of these bills. Should the faithful be forced to listen to a campaign speech before they hear the homily? When worshipers donate to the collection plate, will they have any control over how much of that donation goes to a candidate for president, rather than to a soup kitchen?

Id. at 81.

90. See, e.g., *Christian Echoes Nat’l Ministry, Inc. v. United States*, 470 F.2d 849, 857 (10th Cir. 1972) (stating that the ban, as applied to a religious organization, restrained the Free Exercise Clause “only to the extent of denying tax exempt status and then only in keeping with an overwhelming and compelling Governmental interest,” which the court identified as “guarantying that the wall separating church and state remain high and firm”).

91. See, e.g., Ellen P. Aprill, *Churches, Politics, and the Charitable Contribution Deduction*, 42 B.C. L. REV. 843, 873 (2001) (“[G]overnment policymakers have viewed the charitable contribution deduction from its beginning as an incentive and a subsidy.”); Chisolm, *supra* note 18, at 320 (“It is nearly as settled, at least in Congress and the courts, that permitting a section 501(c)(3) organization to engage in election-related activity would be equivalent to

plausible theoretical justification for the charity income tax exemption and the charitable contributions deduction.⁹² One alternative to the subsidy theory, advanced by the late Professor Boris Bittker and George Rahdert, posits that taxable income is primarily a concept of relevance to profit-seeking taxpayers, with little value in describing the financial activity of entities. The “receipts” of these organizations typically do not derive from commercial sales, and their “expenses” are not payments made to earn a profit.⁹³ Although Bittker’s income measurement theory may prove too much,⁹⁴ it at least demonstrates that the subsidy theory is not indispensable in justifying the income tax exemption of charities, including churches.

Probably even more significant is Professor William Andrews’s defense of the charitable contributions deduction.⁹⁵ Crafting his case in the terms of the classic formulation of income popularized by Henry Simons,⁹⁶ Professor Andrews argues that

granting a ‘subsidy’ of public funds for the activity.”); John D. Colombo, *The Marketing of Philanthropy and the Charitable Contributions Deduction: Integrating Theories for the Deduction and Tax Exemption*, 36 WAKE FOREST L. REV. 657, 682 (2001) (“[T]he most widely accepted rationale for the section 170 deduction remains that the deduction helps subsidize the activities of charitable organizations.”); Murphy, *supra* note 18, at 79–81; Tobin, *supra* note 18, at 1317 (citing *Regan v. Taxation with Representation*, 461 U.S. 540, 544 (1983)); Zelinsky, *supra* note 76, at 808 (“Perhaps the most common characterization of tax exemptions, exclusions, and deductions is that they subsidize.”).

92. For a summary of the major theories supporting the exemption of charitable organizations from federal income taxation, see Johnny Rex Buckles, *The Case for the Taxpaying Good Samaritan: Deducting Earmarked Transfers to Charity Under Federal Income Tax Law, Theory and Policy*, 70 FORDHAM L. REV. 1243, 1284–96 (2002). See generally Rob Atkinson, *Altruism in Nonprofit Organizations*, 31 B.C. L. REV. 501 (1990); Boris I. Bittker & George K. Rahdert, *The Exemption of Nonprofit Organizations from Federal Income Taxation*, 85 YALE L.J. 299 (1976); Brody, *supra* note 73; Nina J. Crimm, *An Explanation of the Federal Income Tax Exemption for Charitable Organizations: A Theory of Risk Compensation*, 50 FLA. L. REV. 419 (1998); Mark A. Hall & John D. Colombo, *The Donative Theory of the Charitable Tax Exemption*, 52 OHIO ST. L.J. 1379 (1991); Henry Hansmann, *The Rationale for Exempting Non-Profit Organizations from Corporate Income Taxation*, 91 YALE L.J. 54 (1981).

93. Bittker & Rahdert, *supra* note 92, at 307–14.

94. Professor Henry Hansmann correctly observes that (i) many nonprofits receive no or little income from donations, but rely instead on commercial operations as a source of funds; (ii) even donations to organizations providing services to third parties can be broadly viewed as “purchases” (that generate revenues to the donees) of such services on behalf of the ultimate beneficiaries; and (iii) the costs of providing those services would be deductible “business-related” expenses of the charities. See Hansmann, *supra* note 92, at 58–62.

95. See William D. Andrews, *Personal Deductions in an Ideal Income Tax*, 86 HARV. L. REV. 309, 312 (1972) (stating that the ideal income tax must be “refined to reflect the intrinsic objectives of the tax,” and that it is “imperative to consider carefully whether a provision can be defended by reference to intrinsic matters of tax policy before evaluating it as if it were something else”). For critiques of Professor Andrews’s theory, see, e.g., Colombo, *supra* note 91, at 679–82; Mark G. Kelman, *Personal Deductions Revisited: Why They Fit Poorly in an “Ideal” Income Tax and Why They Fit Worse in a Far from Ideal World*, 31 STAN. L. REV. 831, 831–58 (1979); Stanley A. Koppelman, *Personal Deductions Under an Ideal Income Tax*, 43 TAX L. REV. 679, 688–90 (1988).

96. Simons defines income as follows: “Personal income may be defined as the algebraic sum of (1) the market value of rights exercised in consumption and (2) the change in the value of the store of property rights between the beginning and end of the period in question.” HENRY

a properly conceived "income" tax reaches a taxpayer's "aggregate personal consumption and accumulation of real goods and services and claims thereto."⁹⁷ Andrews argues that if income means consumption plus accumulation, a deduction is proper whenever a taxpayer expends money for whatever is not personal consumption or accumulation.⁹⁸ The former means only the consumption of "divisible, private goods and services," the consumption of which "by one household precludes enjoyment by others."⁹⁹ Taxable personal consumption therefore does not include a taxpayer's consumption of "collective goods whose enjoyment is nonpreclusive," nor does it include the "nonmaterial satisfactions" derived from a taxpayer's mere act of charitable giving.¹⁰⁰ It follows that charitable contributions do not constitute personal consumption and therefore should be deductible in computing a taxpayer's income.¹⁰¹

Another alternative to the subsidy theory that extends the thesis of Professor William Andrews is the "community income theory" of the charitable contributions deduction and the charity income tax exemption.¹⁰² This theory first observes that the federal government refrains from taxing numerous forms of benefits (provided by government, business firms, charities, and other sources) that people enjoy.¹⁰³ The theory then argues that the federal individual income tax base properly excludes these benefits because they are more appropriately attributed not to individual community members,¹⁰⁴ but to the community itself.¹⁰⁵ Further, the theory avers that the community may not be an appropriate object of taxation.¹⁰⁶ The community is conceivably best viewed as properly exempt from taxation because government exists primarily to promote the welfare of the community (rather than the welfare of only selected individuals).¹⁰⁷

The relationship between charities and the community is central to the community income theory.¹⁰⁸ Functioning properly, charities exist to benefit the community¹⁰⁹ —

C. SIMONS, PERSONAL INCOME TAXATION: THE DEFINITION OF INCOME AS A PROBLEM OF FISCAL POLICY 50 (1938).

97. Andrews, *supra* note 95, at 313.

98. *See id.* at 325.

99. *Id.* at 314–15.

100. *Id.* at 315.

101. In the case of contributions to non-redistributive charitable donees, a deduction is proper because they generally produce public goods that are not enjoyed by contributors in proportion to their contributions. *See id.* at 358–59. Further, in the case of contributions to a donee that redistributes donations to the poor, consumption made possible by the funds, or accumulation resulting from receipt of the funds, is shifted from the donor to the impoverished recipients of funds donated to charity. The ultimate recipients should not be taxed at the presumably higher rates of tax to which donors are subject. *See id.* at 347.

102. *See* Johnny Rex Buckles, *The Community Income Theory of the Charitable Contributions Deduction*, 80 IND. L.J. 947 (2005).

103. *See id.* at 967–74.

104. *See id.* at 970–74.

105. *See id.* at 973.

106. *See id.* at 973–74.

107. *See id.*

108. *See id.* at 977–79.

109. *See* Bob Jones Univ. v. United States, 461 U.S. 574, 591 (1983) ("[C]haritable exemptions are justified on the basis that the exempt entity confers a public benefit."); *id.* at 590 n.16 ("The common law requirement of public benefit is universally recognized by

that is to generate community income—and therefore may be viewed as community agents. Federal income tax law attributes to a principal whatever income is earned by an agent for the principal.¹¹⁰ Hence, if the principal, that is, the community, should be exempt from taxation, the income earned by the community's agent, that is, a charity for the community, should likewise be exempt from taxation. A similar analysis may justify the charitable contributions deduction.¹¹¹

The community income theory provides yet another alternative to the subsidy theory to justify the charity income tax exemption and the charitable contributions deduction.¹¹² Under the community income theory, the charity income tax exemption and the charitable contributions deduction ensure that “income” is properly calculated. Rather than imparting a governmental subsidy, Code §§ 170 and 501(c)(3) simply ensure that the federal government refrains from taxing that which theoretically should not be taxed—community income.

The presence of theoretical explanations for the charity income tax exemption and the charitable contributions deduction other than the subsidy theory should give one pause.¹¹³ If the charity income tax exemption and the charitable contributions deduction may plausibly be understood not to impart a governmental subsidy to charities, the first assumption of Subsidy-Based Normative Separationism is erroneous, and the theory largely collapses.

The second assumption of Subsidy-Based Normative Separationism suffers from the weakness identified in the discussion of Subsidy-Based Constitutional Separationism.¹¹⁴ In brief, as a condition of obtaining tax exemption under Code § 501(c)(3), a church must advance a religious purpose. If tax exemption is tantamount to a direct governmental subsidy of the church's religious activities, Subsidy-Based Normative Separationism logically compels the conclusion that the whole scheme of exempting churches from federal income taxation violates the separation norm. The more specific question of whether lifting the ban on electioneering itself would contravene the separation norm is largely a moot point. It remains relevant only if one can explain why granting a subsidy under a “no electioneering” rule offends the

commentators on the law of trusts.”); Treas. Reg. § 1.501(c)(3)–1(d)(1)(ii) (as amended in 2008) (“An organization is not organized or operated exclusively for one or more [exempt purposes] unless it serves a public rather than a private interest.”).

110. See *Poe v. Seaborn*, 282 U.S. 101 (1930).

111. See Buckles, *supra* note 102, at 979–84.

112. As has been observed, see Buckles, *supra* note 102, at 978, the community income theory of the charity income tax exemption and the charitable contributions complements Professor Evelyn Brody's theory of exemption based upon sovereignty. The community income theory helps articulate why charitable organizations have been treated as co-sovereigns with the state. Just as government exists for the community, so do charitable entities. If community income is not properly included in the tax base, it is sensible to exclude from the tax base the income of those institutions that represent and embody the community—government and charities.

113. A few other scholars have rejected the view that exemption is tantamount to a subsidy for purposes of constitutional law, at least in the context of religious organizations. See, e.g., KELLEY, *supra* note 61, at 32–34; Zelinsky, *supra* note 76, at 807 (“[I]t is most convincing to think of religious tax exemption as the acknowledgment of sectarian sovereignty (rather than the subsidization of religion).”); *id.* at 836–41 (arguing that tax exemption for religious entities is best understood as base-defining).

114. See *supra* text accompanying notes 84–88.

separation norm less than granting a subsidy while permitting the grantee to engage in electioneering. Any such explanation is elusive.

One may speculate that proponents of Subsidy-Based Normative Separationism fear that if churches are allowed to endorse candidates, the candidates will be more likely to aid churches in some manner, thereby tending to establish the religions of those churches that once supported the candidates.¹¹⁵ In order to relate this concern to the supposed subsidy received by churches, one would need to demonstrate either that (i) the alleged subsidy received by churches is greater than that received by other charities, such that lifting the ban would allow churches to devote more subsidized funding for electioneering than could other charities, or (ii) churches are more likely than other charities to leverage effectively whatever subsidy they do receive to support or oppose political candidates and thereby disproportionately affect public policy. For reasons discussed below,¹¹⁶ (ii) is at least dubious. As to (i), the empirical evidence suggests that, if anything, churches probably benefit less from tax exemption and the charitable contributions deduction than do many other types of § 501(c)(3) organizations. The explanation is twofold. First, unlike charities that receive a large percentage of their income as fees for services and/or investment returns (such as hospitals and universities), churches receive the vast portion of their revenues from annual donations that would be excludible from gross income as gifts even apart from § 501(c)(3).¹¹⁷ Second, relative to other charitable donees, churches receive a large percentage of their contributions from donors who are less likely to claim charitable contributions deductions under Code § 170 for their donations.¹¹⁸

Because the concern of enhanced church influence over public policy as a result of lifting the ban likely has little or no correlation to the alleged subsidy received by churches, the concern is better expressed in an argument against church participation in politics quite apart from the subsidy theory. To this final variation of the argument this Article now turns.

IV. NORMATIVE HYPER-SEPARATIONISM

According to “Normative Hyper-Separationism,” the federal government should, as a matter of sound policy grounded in the separation norm, retain the ban in order to discourage churches from expressing a partisan voice in political campaigns, notwithstanding that the Constitution does not compel this silencing of churches, and notwithstanding that the Code may not impart a subsidy to churches through §§ 170

115. See *infra* text accompanying notes 152–54.

116. See *infra* text accompanying notes 155–58.

117. See I.R.C. § 102 (2006). I agree with the conclusion of Professor Michael Hatfield that a charitable organization’s receipts from charitable donations would likely constitute excludible gifts under Code § 102 in the absence of Code § 501(c)(3). See Michael Hatfield, *Ignore the Rumors—Campaigning from the Pulpit Is Okay: Thinking Past the Symbolism of Section 501(c)(3)*, 20 NOTRE DAME J.L. ETHICS & PUB. POL’Y 125, 155–57 (2006). Further, as Professor Hatfield notes, see *id.* at 155 & n.140, at least one court has so opined. See, e.g., *Branch Ministries v. Rossotti*, 211 F.3d 137, 143 (D.C. Cir. 2000). The IRS has agreed with this position in at least one technical advice memorandum. See I.R.S. Tech. Adv. Mem. 68-121-21 (Dec. 12, 1968).

118. See Aprill, *supra* note 91, at 845–46; Hatfield, *supra* note 117, at 157–58.

and 501(c)(3). In short, Normative Hyper-Separationism holds that the separation norm counsels that the ban is just sound policy, because churches have no business entering politics, and it is government's business to keep them out of politics.

Judging from academic and popular commentary, Normative Hyper-Separationism appears to enjoy fairly wide appeal.¹¹⁹ However, the assumptions upon which Normative Hyper-Separationism rests are not always carefully articulated. One may identify one or more of the following as likely assumptions supporting the theory:

1. The space of public discourse leaves no room for religious discourse, at least in the context of partisan political speech. Under this assumption, a church's positions on political candidates must be banished from the public square's discourse on political campaigns by all constitutional means.¹²⁰ This Article refers to this assumption as the "Religious Speech Boundary Assumption."

2. People are more likely to listen to the religious political voice of churches than to other voices in public discussions of political campaigns. As such, if churches are not discouraged from engaging in partisan political speech, then they will have a disproportionately influential role in determining the outcomes of political elections. This Article refers to this assumption as the "Disproportionate Influence Assumption."

3. If churches have a voice in political campaigns, then those who are elected to public office will be more inclined to enact laws that tend to favor the churches (or the policies supported by the churches) that supported those candidates. Stated more pointedly: the victorious candidates may be more likely to enact policies that tend to establish the religions of those churches that supported the political campaigns of the victorious candidates. This Article refers to this assumption as the "Triumphant Establishment Assumption."

A. The Religious Speech Boundary Assumption

A rich body of literature discusses whether religiously based moral discourse in public policy deliberations is consistent with the ideals of a liberal democracy.¹²¹

119. Several of the arguments advanced by those who adhere to some other version of separationism identified in this Article rely upon the assumptions of Normative Hyper-Separationism. Accordingly, when this is the case, their positions are cited and analyzed in this Part of the Article. The reader should not infer that I am misclassifying their arguments; I am simply discussing them in the Part to which they most logically relate.

120. See Houck, *supra* note 19, at 58–59 (stating that some believe that "organized religion plays a dangerous role in American political life, and threatens basic principles of democracy: discourse, reason, and compromise"—and reasoning that religious arguments "are based on the word of God [and] do not lend themselves easily to debate, reason, or a search for consensus" (internal citations omitted)).

121. See, e.g., ROBERT AUDI, *RELIGIOUS COMMITMENT AND SECULAR REASON* (2000); ROBERT AUDI & NICHOLAS WOLTERSTORFF, *RELIGION IN THE PUBLIC SQUARE* (1997); CHRISTOPHER J. EBERLE, *RELIGIOUS CONVICTION IN LIBERAL POLITICS* (2002); KENT GREENAWALT, *PRIVATE CONSCIENCES AND PUBLIC REASONS* (1995); RICHARD JOHN NEUHAUS, *THE NAKED PUBLIC*

Rather than attempt to resolve this debate, this Article undertakes a much more modest task. It examines whether the current income tax regime governing exempt entities, and churches in particular, is an effective and appropriate means of confining religious speech to its supposed "proper" sphere, under the highly contestable assumption that religious discourse is an unwelcome intruder in political-campaign-related public deliberations.

The first problem with justifying current law under the Religious Speech Boundary Assumption is that the ban of Code § 501(c)(3) is an over-inclusive means for redressing the harm sought to be avoided. There are three reasons that the ban is over-inclusive if its justification lies in the Religious Speech Boundary Assumption. First, and most obviously, the ban applies to numerous types of charitable, educational, scientific, and other non-sectarian entities, not simply to churches.¹²² Thus, a tax-exempt scientific organization that desires to endorse a candidate supporting expanded stem-cell research for purely non-sectarian reasons is muted to the same degree, as is a church that desires to oppose the candidate for theological reasons. Secondly, the ban reaches all types of statements in support of (and in opposition to) candidates for public office, including statements expressed in strictly non-sectarian terms. Thus, both a university and a church are equally silenced by the ban, even if both entities express positions on a candidate without invoking the Bible (or some other sacred text), theology, or even morality or ethics. The third reason that the ban is an over-inclusive remedy for the problem identified by the Religious Speech Boundary Assumption is that the ban, at least as interpreted by the IRS, silences the partisan political speech of churches not only in public forums, but also within the hallowed halls of the cathedral and the intimate circle of a church family. The IRS interprets the ban to prohibit politically partisan speech from the pulpit, at official meetings of members, and in church newsletters distributed to members.¹²³ Although the IRS's position is largely illogical,¹²⁴ the present point is simply that the agency interprets the ban to apply to the "private square," not merely to the "public square."¹²⁵ Whatever the merits of the Religious Speech Boundary Assumption, the ban reaches well beyond the boundaries that the assumption contemplates.

SQUARE: RELIGION AND DEMOCRACY IN AMERICA (2d ed. 1986); MICHAEL J. PERRY, UNDER GOD?: RELIGIOUS FAITH AND LIBERAL DEMOCRACY (2003); JOHN RAWLS, POLITICAL LIBERALISM (1993); Kent Greenawalt, *What Are Public Reasons?*, 1 J.L. PHIL. & CULTURE 79 (2007); Michael W. McConnell, *Secular Reason and the Misguided Attempt to Exclude Religious Argument from Democratic Deliberation*, 1 J.L. PHIL. & CULTURE 159 (2007); John Rawls, *The Idea of Public Reason Revisited*, 64 U. CHI. L. REV. 765 (1997); Jeremy Waldron, *Religious Contributions in Public Deliberation*, 30 SAN DIEGO L. REV. 817 (1993).

122. See I.R.C. § 501(c)(3) (2006).

123. See *supra* notes 13–15 and accompanying text.

124. When a church leader addresses church members, it is far more logical to conclude that he or she is speaking "to" the church than that he or she is speaking "for" the church. The church, after all, is an entity composed of members. When those members are being addressed, it is counterintuitive to view the message that they hear as a message from themselves. It is far more sensible to view the message as that of the individual leader. Only when the message is broadcast in some fashion to the general public, and under circumstances indicating the church's approval of the message, is it sensible to view the message as proceeding from the church.

125. See Totten, *supra* note 18, at 303 (stating that the ban "reaches discourse within the community, where members together discern how they might live out their faith in the world").

Paradoxically, the ban is also under-inclusive as a means for redressing the harm that the Religious Speech Boundary Assumption seeks to avoid. First, it is absolutely clear that the ban does not prevent church pastors and other leaders from endorsing and opposing candidates when they speak for themselves, rather than for their churches.¹²⁶ Indeed, a pastor can even identify himself as the pastor of his church prior to proclaiming his position on candidates,¹²⁷ and can articulate his reasons in the most religious of terms. This fact alone seriously undermines the justification for the ban under the Religious Speech Boundary Assumption. Whether the pastor proclaims his religiously grounded choice of a candidate from the belfry of his church or the rooftop of city hall, religious discourse has penetrated the public square. The ban is utterly powerless to prevent it.

The second under-inclusive aspect of the ban is that it does not apply to tax-exempt entities described in sections other than § 501(c)(3). For example, organizations described in § 501(c)(4) are free to engage in partisan political speech, and they may do so even if they are affiliated with a church.¹²⁸ Thus, members of a church may form a § 501(c)(4) affiliate¹²⁹ and publicly endorse candidates on expressly religious grounds until they are blue (or red, as the case may be) in the face.¹³⁰ Again, doing so infuses the public sphere with religious discourse, and the ban does not prevent it. The ban simply makes it more expensive, insofar as a separate legal entity must be formed and must apply for exemption.

Another problem with the Religious Speech Boundary Assumption as a justification for the ban is that the assumption fails to justify one rule for political endorsements (prohibition) and a very different rule for lobbying (permitted as an insubstantial part of a church's activities).¹³¹ Although churches are not permitted¹³² to make the special election¹³³ under § 501(h), which enables public charities in general to make lobbying

126. See PUB. 1828, *supra* note 13, at 7 (Examples 1 and 2).

127. See *id.* (Example 1).

128. See I.R.C. § 501(c)(4) (2006); Rev. Rul. 81-95, 1981-1 C.B. 332. Occasionally, a court or commentator asserts that a § 501(c)(4) organization may not directly engage in political campaign activities. See, e.g., *Branch Ministries v. Rossotti*, 211 F.3d 137, 143 (D.C. Cir. 2000); Feld, *supra* note 18, at 936. However, the Treasury regulations state only that the promotion of social welfare does not include such activities. Treas. Reg. § 1.501(c)(4)-1(a)(2)(ii) (as amended in 1990). As long as an organization is "primarily engaged" in promoting the general welfare of the community, see *id.* § 1.501(c)(4)-1(a)(2)(i), it may engage in non-exempt activities (such as electoral politics) to some degree.

129. A charity can supervise the creation of a § 501(c)(4) organization to engage in political campaign activity. See *Rossotti*, 211 F.3d at 143. Indeed, as one legal scholar has creatively suggested, a church itself can file for federal income tax exemption as an organization described in § 501(c)(4) if it is willing to forgo the ability to receive tax-deductible contributions, at least in part. See Douglas H. Cook, *The Politically Active Church*, 35 LOY. U. CHI. L.J. 457, 473-74 (2004).

130. The only limitation is that the political-campaign-related activities must not be so extensive that the entity is no longer operated primarily for purposes not described in § 501(c)(4).

131. See I.R.C. § 501(c)(3).

132. See I.R.C. § 501(h)(5)(A).

133. See I.R.C. § 501(h)(3).

expenditures within quantitatively determined ceilings,¹³⁴ churches are perfectly free to attempt to influence legislation (through both grass roots lobbying and direct appeals to legislative bodies) under the less quantitatively precise “insubstantial part” test.¹³⁵ Further, churches can cast their appeals for the adoption or repeal of legislation in as religiously charged language as they desire without incurring tax penalties. Plainly, this more permissive rule for lobbying under § 501(c)(3) seriously undermines the position that the Religious Speech Boundary Assumption justifies the ban of § 501(c)(3).

Aside from its over- and under-inclusiveness, the Religious Speech Boundary Assumption is suspect for another reason, even if one assumes, *arguendo*, that its vision of a public sphere devoid of religiously grounded discourse is optimal. The Religious Speech Boundary Assumption serves as a possible justification for the ban only if one also embraces the premise that purging the public sphere of religiously grounded discourse is the proper domain of government. As citizens of a country committed to fundamental freedoms, including the free exercise of religion and freedom of speech, we should closely scrutinize any premise that government has an interest in squelching the speech of private actors—whether or not it is religiously grounded, and perhaps *especially* when it is religiously grounded.¹³⁶ In general, the ability to speak freely in the political process is a core First Amendment value.¹³⁷ When this speech is understood by the speaker to comprise an element of the speaker’s religious faith, the ability to engage in this speech is no less a core First Amendment value;¹³⁸ the speaker is exercising the freedom of expression and freely exercising the speaker’s religion. Certainly, the Court has upheld the constitutionality of certain types of restrictions on electioneering communications.¹³⁹ But these restrictions have nothing to do with the perspective of the speaker, nor could they under constitutional law. Governmental interference with speech must remain viewpoint neutral.¹⁴⁰

Indeed, to enlist government to suppress public political speech on account of its religious content offends not only free speech norms but also the very separation norm

134. See I.R.C. §§ 501(h)(1)-(2).

135. See Treas. Reg. § 1.501(c)(3)-1(c)(3)(ii) (as amended in 2008) (stating that an organization is not disqualified from § 501(c)(3) “merely because it advocates, as an insubstantial part of its activities, the adoption or rejection of legislation”).

136. See Laycock, *supra* note 36, at 798 (“Speech that is both religious and political is at the core of two clauses; it is at the highly protected core of the First Amendment for multiple reasons.”); cf. *Employment Div. v. Smith*, 494 U.S. 872, 881–82 (1990) (observing that the First Amendment may prohibit application of a neutral, generally applicable law when the private action in question involves both the exercise of religion and speech).

137. See *Buckley v. Valeo*, 424 U.S. 1, 39 (1976) (*per curiam*).

138. Cf. *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 830–35 (1995) (opining that viewpoint discrimination includes attempts to exclude theologically phrased speech from the marketplace of ideas); *Widmar v. Vincent*, 454 U.S. 263, 269 (1981) (holding that religious worship and speech are forms of speech and association protected by the First Amendment).

139. See, e.g., *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 654–55 (1990) (upholding state restrictions on independent expenditures of corporations expressly advocating or opposing candidates for elective state office).

140. See *Lamb’s Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 393–95 (1993); *Members of the City Council v. Taxpayers for Vincent*, 466 U.S. 789, 804 (1984).

supposedly advanced by Normative Hyper-Separationism.¹⁴¹ It is one thing to argue that churches should restrain themselves in discussions of public policy matters; it is quite another to argue that government should do the restraining. The zealous attempt to prevent the intrusion of religion into governmental affairs via the ban perversely violates the separation norm by sanctioning the intrusion of government into religious affairs.¹⁴² To justify the ban on such grounds is to commission government to muzzle the mouths of churches so that they say only what government thinks they should say—even if their religious faith compels them to speak boldly and directly to issues (including elections) that have both religious and political significance.¹⁴³ In contrast, the separation norm supports the position that churches, not government, should determine the propriety of their speech.

Nor must one of the actors—government or religious institutions—inevitably accept intrusion from the other. When government penalizes religious speech in the public square through the tax system in an attempt to limit the religious voice in accordance with what government believes is religion's proper scope, it employs the coercive force of law.¹⁴⁴ But when the religious voice is allowed to define itself (imagine that!) such that at times it resounds in the public square, at most that voice will influence private actors, who can choose whether to heed the religious voice. In other words, the religious voice is powerless to compel government action. The religious voice can merely persuade. Hence, the separation norm poses no real dilemma that forces either the government or religion to yield its rightful territory to the other.

That the ban offends the separation norm perhaps becomes most apparent when one comprehends the entanglement of government and churches resulting from the ban. As the Court observed in *Walz*, one justification for exempting from taxation the property owned by churches is that doing so reduces at least some inevitable conflicts between

141. As Justice Brennan once stated, the Establishment Clause “may not be used as a sword to justify repression of religion or its adherents from any aspect of public life.” *McDaniel v. Paty*, 435 U.S. 618, 641 (1978) (Brennan, J., concurring).

142. See STEPHEN L. CARTER, *GOD'S NAME IN VAIN: THE WRONGS AND RIGHTS OF RELIGION IN POLITICS* 70 (2000) (stating that “the effort to use law to reign in the speech of clergy runs counter to the origin and core meaning of the separation of church and state”); Buckles, *A Reply*, *supra* note 18, at 1086–87. Similarly, Professor Esbeck has argued that a governmental decision “to leave religion alone” does not establish religion, but instead reinforces the separation of church and state. Carl H. Esbeck, “*Play in the Joints Between the Religion Clauses*” and Other *Supreme Court Catachreses*, 34 HOFSTRA L. REV. 1331, 1332 (2006).

143. That many churches so understand their mission is plain. See, e.g., Vaughn E. James, *The African-American Church, Political Activity, and Tax Exemption*, 37 SETON HALL L. REV. 371, 396–401 (2007) (describing the crucial role of political involvement in African-American churches).

144. Professor Stephen Carter colorfully states the point as follows:

Imagine . . . a state so insecure and, at the same time, so totalitarian, so determined to invest every corner of society with a single, state-imposed vision of right and wrong, that it actually doles out benefits to those churches that preach the right messages and denies those benefits to churches that preach the wrong ones. . . .

The nation I describe is the United States of America

CARTER, *supra* note 142, at 67; see also Lee, *supra* note 18, at 434 (stating that the Code “pays churches through tax-exempt status to be silent on issues deemed by the state to be political”).

churches and government.¹⁴⁵ The same may be said of income tax exemption. However, both taxation and exemption require a degree of governmental involvement in the life of a church.¹⁴⁶ Cognizant of this fact, the Court in *Walz* stated that, in determining the constitutionality of either tax exemption or taxation of churches, the issues are whether the governmental involvement “is excessive, and whether it is a continuing one calling for official and continuing surveillance leading to an impermissible degree of entanglement.”¹⁴⁷ The ban requires odious entanglement between church and state. As interpreted by the IRS, the ban requires the agency to monitor and decide such matters as whether a pastor is speaking on behalf of himself or on behalf of a church;¹⁴⁸ whether a sermon or newsletter discussing pressing moral issues of the day is really a disguised endorsement of a candidate;¹⁴⁹ whether a forum for candidates sponsored by a church features a sufficient breadth of questions;¹⁵⁰ and whether a church has invited a public figure to speak in a “candidate” or in a “non-candidate” capacity.¹⁵¹ Policing these messages and invitations to speak never ends, and it theoretically requires the agency to scrutinize every word of a sermon and to monitor every guest in a pulpit. The entanglement is severe.

For all of these reasons—regardless of whether one believes that religiously based moral discourse in public policy deliberations is consistent with the ideals of a liberal democracy—it is doubtful that the Religious Speech Boundary Assumption justifies the ban. Before one accepts Normative Hyper-Separationism, one must locate a foundation firmer than the Religious Speech Boundary Assumption.

B. The Disproportionate Influence Assumption

An independent assumption that may support Normative Hyper-Separationism is the Disproportionate Influence Assumption. Under this assumption, if churches are not discouraged from engaging in partisan political speech, then they will have a disproportionately influential role in determining the outcomes of political elections. In the worst-case scenario, churches will decide who wins elections.¹⁵² Under this view, § 501(c)(3) is necessary to ensure that churches do not dominate the political process.¹⁵³

The Disproportionate Influence Assumption has some intuitive appeal. Many people respect the views of their churches and church leaders greatly. Indeed, many religious

145. *Walz v. Tax Comm’n*, 397 U.S. 664, 674–75 (1970) (“Granting tax exemptions to churches necessarily operates to afford an indirect economic benefit and also gives rise to some, but yet a lesser, involvement than taxing them.”).

146. *See id.*

147. *Id.* at 675.

148. *See* PUB. 1828, *supra* note 13, at 7.

149. *See* Rev. Rul. 2007-41, 2007-25 I.R.B. 1421.

150. *See* PUB. 1828, *supra* note 13, at 10.

151. *See id.* at 10–12.

152. *Cf.* Houck, *supra* note 19, at 61 (opining that “separating churches from political activity was probably axiomatic” to the founders and that “funding religious organizations to elect the state’s legislature would be about the most counter-intuitive step imaginable” in ensuring the anti-establishment of religion).

153. That churches should not dominate the political process explains in part why some commentators favor the ban. *See, e.g.,* Tobin, *supra* note 18, at 1326–29.

citizens probably value the opinions of certain religious leaders more than they value those of any other person. Thus, one must at least recognize the possibility that if churches are not prohibited by § 501(c)(3) from supporting or opposing candidates for public office, then they will wield a heightened influence in the political process.¹⁵⁴

Although the Disproportionate Influence Assumption is at least plausible, the better view is that removing the ban will probably not lead to church domination of the electoral process, for several reasons. First, in the absence of the ban, one would not expect churches in this country to unite behind the same candidate or candidates. American churches are extremely theologically diverse. One would expect churches to have a wide variety of opinions on which candidates should be elected.¹⁵⁵ Hence, while lifting the ban may increase the ability of a church to influence voters who are theologically aligned with that church, lifting the ban would do the same for a church holding different theological positions and supporting different candidates.¹⁵⁶ Given the pluralistic state of religion in America, lifting the ban would not likely dramatically enhance the ability of religious institutions as a class to shape electoral outcomes.

Moreover, were the ban lifted, *the entire class of charitable, religious, educational, scientific, literary, and other organizations described in § 501(c)(3)* would be as free as churches to endorse or oppose candidates. Just as lifting the ban may increase the ability of a church to influence voters who are theologically aligned with that church, so also may lifting the ban enable a non-sectarian charity to influence voters who are aligned with the educational, scientific, or philanthropic mission of that charity. Further, the charitable sector as a whole is notably pluralistic in its visions and constituencies.¹⁵⁷ The highly diverse group of non-sectarian § 501(c)(3) entities would

154. See Houck, *supra* note 19, at 59 (observing the danger of “an electorate prepared—indeed commanded in some churches—to vote by faith”).

155. Gaffney, *supra* note 18, at 37 (“Exempt religious organizations by no means agree with one another about many of the issues on today’s political agenda . . .”). Steffen Johnson has nicely stated the point:

Some might fear that widening the doorway to churches’ involvement in politics would tilt the public debate in a certain direction—skewing it, for example, in favor of either the Reverend Jesse Jackson or those who make up the “religious right.” Such concerns seem unfounded. Churches’ views on political matters, and their approach to expressing them, vary widely. . . . [T]here is a healthy pluralism of approaches to involvement in politics in American churches—but remarkable agreement on the fact that faith has something to say about the policies and the people who appear on the political stage.

Johnson, *supra* note 18, at 884–85.

156. Cf. Totten, *supra* note 18, at 308 (stating that “the broad range of political viewpoints expressed from pulpits . . . dilutes any claim that a taxpayer is subsidizing a particular position she finds objectionable”).

157. See Elizabeth T. Boris, *The Nonprofit Sector in the 1990s*, in *PHILANTHROPY AND THE NONPROFIT SECTOR IN A CHANGING AMERICA* 1 (Charles T. Clotfelter & Thomas Ehrlich eds., 1999); David A. Brennen, *A Diversity Theory of Charitable Tax Exemption—Beyond Efficiency, Through Critical Race Theory, Toward Diversity*, 4 *PRIT. TAX REV.* 1, 24 (2006) (stating that “the charitable tax exemption allows for diversity and experimentation that often lead to production of undiscovered values”); Johnny Rex Buckles, *Reforming the Public Policy Doctrine*, 53 *U. KAN. L. REV.* 397, 463–66 (2005); Albert M. Sacks, *The Role of Philanthropy: An Institutional View*, 46 *VA. L. REV.* 516, 524 (1960).

therefore tend to compete with religious institutions in swaying voters in the absence of the ban.

There is, however, another, and probably the most compelling, reason to question the Disproportionate Influence Assumption. Current law already provides ample opportunities for religious leaders to influence voters. As observed previously,¹⁵⁸ § 501(c)(3) does not prevent a religious leader, such as a pastor or bishop, from personally endorsing or opposing a candidate for public office. Such endorsements are common. And for many prospective voters who highly regard a religious leader, what matters most is the viewpoint of the beloved religious leader as to whom should be elected, not the official viewpoint of the leader's church (were it to adopt any such viewpoint). Because the law permits church leaders to endorse and oppose political candidates as long as they do not use church resources in doing so or purport to speak for the church, it is unlikely that removing the ban would significantly increase the influence these leaders wield in the political process.

One should recognize that, were the ban lifted, the ability of a religious leader to publicize his or her religiously grounded political views by exploiting the resources of the church, for example, through the church's Web page or through radio and television broadcasts of sermons, would increase. However, a leader who is inclined to utilize church resources for these purposes is already likely to exploit numerous opportunities permitted by current law to publicize his or her views. Examples include press releases, appearances in neutral broadcast media for interviews, and the use of § 501(c)(4) affiliates of the church. Although relaxing the ban would enhance the ease with which a vocal religious leader could take his or her message to the masses, it is far from clear that relaxing the ban would significantly increase the influence that he or she already commands under existing law. Moreover, the leaders of churches with different theological perspectives, as well as the leaders of non-sectarian charities, would be equally capable of using institutional resources to publicize the leaders' political preferences.

Finally, like the Religious Speech Boundary Assumption, the Disproportionate Influence Assumption fails to justify one rule for political endorsements (prohibition) and a more lenient rule for lobbying (permitted as an insubstantial part of a church's activities). If churches are likely to dominate the electoral process in the absence of the ban, why are they not likely to dominate the legislative process in the absence of a prohibition on lobbying? Indeed, if anything, one may plausibly argue that endorsing political candidates is more innocuous than lobbying, because lobbying often involves a closer nexus between church and state than electioneering. A church that engages in direct lobbying is attempting to persuade public policymakers themselves. In contrast, a church that endorses or opposes a political candidate is just attempting to persuade individual voters, who will exercise their own choices in electing candidates responsible for enacting public policy.

In summary, Normative Hyper-Separationism may find modestly greater support in the Disproportionate Influence Assumption than in the Religious Speech Boundary Assumption. However, the diversity of churches in America, the presence of a highly pluralistic, non-sectarian charitable sector, and the channels already available to religious leaders under current law for expressing political preferences all suggest that

158. See *supra* notes 126–27 and accompanying text.

the Disproportionate Influence Assumption should be viewed with no small measure of skepticism.

C. Triumphant Establishment Assumption

A third possible assumption supporting Normative Hyper-Separationism is the Triumphant Establishment Assumption. Under this assumption, if churches have a voice in political campaigns, those who are elected to public office will be more inclined to enact laws that tend to favor the churches (or the policies supported by the churches) that supported those candidates. Stated more pointedly, the victorious candidates may be more likely to enact policies that tend to establish the religious viewpoints of those churches that supported the political campaigns of the victorious candidates.¹⁵⁹

There are two possible explanations for this propensity for establishment. One explanation is that, were churches permitted to dominate the political process, presumably they would be empowered to help elect public officials who are more inclined to implement public policies favored by churches (such as laws defining marriage, enhanced spending for the poor, or laws restricting late-term abortions).¹⁶⁰ Of course, for the reasons discussed above,¹⁶¹ this explanation suffers from the implausibility of its premise that removing the ban would enable churches to dominate the political process. An alternative explanation, and the one that this Article examines in this Part, is that victorious candidates will "reward" the churches that supported the candidates by enacting policies favored by the churches. This explanation essentially recognizes that victorious candidates are in the habit of keeping their constituents happy.

One weakness in the Triumphant Establishment Assumption is its failure to reflect that the Establishment Clause already protects against the most blatant forms of establishments that might otherwise become law.¹⁶² For example, if a group of large churches favoring state-sponsored prayer in schools publicly endorsed a gubernatorial candidate who prevailed in the state's general election, it does not necessarily follow that schoolchildren across the state would long be petitioning the Almighty en masse before the watchful eyes of their homeroom teachers. Even if the newly elected governor convinced state legislators to enact a state law compelling school-sponsored prayer, the courts would summarily strike down the law as unconstitutional.¹⁶³ Advancing the Triumphant Establishment Assumption to justify the ban under

159. For a similar argument, see Tobin, *supra* note 18, at 1323–24. For a response to that argument, see Buckles, *A Reply*, *supra* note 18, at 1097–98.

160. Cf. Houck, *supra* note 19, at 60 (speculating that, in the absence of the ban, legislators may become "beholden to (or intimidated by)" a church that dominates regional politics).

161. See *supra* text accompanying notes 155–58.

162. See Buckles, *A Reply*, *supra* note 18, at 1094.

163. See, e.g., *Lee v. Weisman*, 505 U.S. 577, 599 (1992) (holding that the practice of inviting a minister or rabbi to pray at public school graduation ceremonies violates the Establishment Clause); *Wallace v. Jaffree*, 472 U.S. 38, 59–60 (1985) (holding that a public school-sponsored moment of silence for meditation or prayer was unconstitutional under the facts indicating state endorsement of prayer); *Engel v. Vitale*, 370 U.S. 421, 430 (1962) (holding that public schools may not recite a daily prayer to students).

Normative Hyper-Separationism is sensible only if one believes that the Establishment Clause is incapable of sufficiently implementing the separation norm.

A second problem with the Triumphant Establishment Assumption is that it may confuse causation with coincidence. As suggested above, one premise of the assumption is that successful candidates will likely reward churches that supported them by enacting policies favored by the churches. But it is not necessarily true that the support that candidates have received from churches would function as a causal factor in the enactment of church-favored policies. One should anticipate that a church (or at least its leaders) may support a candidate precisely because such candidate is campaigning on a platform with which the church (or its leadership) agrees. In such cases, the successful candidate will likely strive to implement that platform once he or she is elected. However, the candidate may do so not because of a desire to “reward” political allies, but because the platform is what the candidate has long believed to be in the best interest of the country. In other words, church leaders may indeed support candidates because of the policy agenda already embraced by the candidates, but it does not follow that the successful candidate’s policy agenda was in any meaningful degree influenced by the political support of churches. Whatever propensity for “establishment” exists is not necessarily causally related to the support received from churches. Only if churches, in the absence of the ban, would wield enhanced political clout is the link between church involvement in elections and establishment tenable. As this Article has previously argued, this prospect is highly contestable.¹⁶⁴

A third problem with the Triumphant Establishment Assumption is that it, like the Religious Speech Boundary Assumption and the Disproportionate Influence Assumption, fails to justify one rule for political endorsements (prohibition) and a very different rule for lobbying (permitted as an insubstantial part of a church’s activities). Even with the ban, churches are free to lobby to some degree for laws that they believe are just, moral, or otherwise sound. One suspects that a church that chooses to lobby will often be supporting the pet legislative project of a politician currently in office. A politician inclined to look with favor upon a church that endorses the politician in a campaign is probably also inclined to look with favor on a church that has supported the legislative agenda of that politician. If there is a risk that a politician would reward campaign supporters through policies that tend to establish the religion of his supporters, current law already tolerates the similar risk that a politician will reward his “legislation supporters” in a similar manner. By permitting lobbying by churches, the current statutory framework is at least partially incoherent under the Triumphant Establishment Assumption.

A fourth major problem with the Triumphant Establishment Assumption is similar to the third. Under the reasonable assumption that many of the public policies that a church would favor on theological grounds are also favored by the church’s leaders (such as bishops, rabbis or pastors), current law already poses the same type of risk imagined under the Triumphant Establishment Assumption. Under current law, a church leader can oppose and endorse candidates publicly, forcefully, and in theologically grounded language, as long as the leader does so on his or her own behalf and without using the resources of the church.¹⁶⁵ Surely reasonable minds can agree

164. See *supra* text accompanying notes 155–58.

165. See PUB. 1828, *supra* note 13, at 7 (Example 2).

that a candidate for public office will be nearly as grateful for a strong, public endorsement from the leader of an esteemed church as he or she would be for a like endorsement from the church body itself.¹⁶⁶ And if a church and its leaders generally favor the same public policies with theological implications, the risk that a politician would “reward” supportive church leaders by enacting the public policies favored by the leaders and their churches is present even under current law. Existing law does little to remove any incentive that a politician may have to influence the enactment of legislation intended to “reward” those who are theologically aligned with their leaders who have supported the politician. The ban simply does not effectively guard against the risk perceived under the Triumphant Establishment Assumption.

Finally, existing Supreme Court jurisprudence should at least give us pause when assessing whether the general thrust of the Triumphant Establishment Assumption is tenable. In its most pointed form, the assumption posits that, in the absence of the ban, victorious candidates would be inclined to enact public policies that tend to establish the religions of those churches that supported the political campaigns of the victorious candidates. The rationale of at least one Supreme Court opinion is to the contrary.

In *McDaniel v. Paty*, an ordained minister who had been elected as a delegate to a state constitutional convention was subsequently disqualified from so serving under a state law disqualifying clergy from such public service.¹⁶⁷ The *Paty* Court found that the state law violated the minister’s right to free exercise of religion under the First Amendment.¹⁶⁸ Writing for a plurality,¹⁶⁹ Chief Justice Burger traced the disqualification of ministers from legislative office from its historical roots in England through thirteen American states (including seven of the original states of the union).¹⁷⁰ Although the clergy-disqualification statutes were once considered rational by some commentators on anti-establishment grounds,¹⁷¹ the plurality found that the state law in question had burdened the minister’s free exercise of religion.¹⁷² The state had required the minister to forfeit his right to serve as such as a condition for exercising the right to seek and hold public office.¹⁷³ For purposes of evaluating the Triumphant Establishment Assumption, what is most important is that the plurality opinion utterly rejected the anti-establishment justification for the law:

The essence of the rationale underlying the Tennessee restriction on ministers is that if elected to public office they will necessarily exercise their powers and influence to promote the interests of one sect or thwart the interests of another,

166. As Professor Allan Samansky has written, when a minister believes that the theological tenets of a religious body compel voting a certain way, the minister’s “communication of that conclusion to her congregants has the authority of her position and learning.” Allan J. Samansky, *Tax Consequences when Churches Participate in Political Campaigns*, 5 GEO. J.L. & PUB. POL’Y 145, 154 (2007). The same may be said of a minister’s public endorsement of a candidate.

167. 435 U.S. 618, 618 (1978).

168. *Id.* at 629.

169. Justices Powell, Rehnquist, and Stevens joined Chief Justice Burger’s plurality opinion. *See id.* at 618.

170. *Id.* at 622–25.

171. *Id.*

172. *Id.* at 629.

173. *Id.* at 626.

thus pitting one against the others, contrary to the anti-establishment principle with its command of neutrality. However widely that view may have been held in the 18th century by many, including enlightened statesmen of that day, the American experience provides no persuasive support for the fear that clergymen in public office will be less careful of anti-establishment interests or less faithful to their oaths of civil office than their unordained counterparts.¹⁷⁴

The *Paty* plurality opinion rejects the notion that “clergymen in public office will be less careful of anti-establishment interests” than anyone else.¹⁷⁵ Surely, one would be hard-pressed to argue that a *non-clergyman* endorsed by one or more churches “will be less careful of anti-establishment interests” than anyone else. A minister’s duty to act in accordance with his or her calling is not confined to the church, synagogue, mosque, or temple. If a commitment to separation of church and state does not require us to doubt the ability of a church-ordained minister to respect the separation norm while serving in public office, it makes little sense to question the ability of others to do so merely because they were supported by one or more churches.¹⁷⁶ If *Paty* is right, the Triumphant Establishment Assumption is dead wrong.

In summary, all three assumptions that arguably support Normative Hyper-Separationism are suspect. Collectively or individually, they (1) fail to account for provisions of current law that undermine the role that the ban is perceived to serve; (2) fail to account for political, religious, and institutional realities that exist despite the ban; or (3) fail to appreciate how government does and should function in faithfully observing the separation norm.

V. CONCLUSION AND IMPLICATIONS

A commitment to separation of church and state, properly understood in the context of the First Amendment and our nation’s history and political ideals, is laudable. This Article recognizes that the separation norm should inform public policies that impel law, including federal tax law. However, this acknowledgment does not imply that the separation norm justifies the effective ban on electioneering by religious organizations. Upon close examination, neither constitutionally-grounded arguments, nor arguments grounded in normative policy goals explain why a commitment to separation of church and state supports the ban as applied to churches. To the contrary, the separation norm counsels against the ban.

The implications of the analysis of this Article are extremely important to the future of political speech generally and religious political speech specifically. As the IRS continues its efforts to enforce the ban through expanded examinations of churches and other charities, one can expect many in the charitable sector to react negatively to the heightened governmental intrusions into their affairs. Leaders and supporters of the nonprofit sector may well conclude that the ban unnecessarily chills political speech and thereafter pressure legislators to relax the ban. To determine what reforms are appropriate, lawmakers will likely seek to obtain a firmer grasp of the rationales for limiting the political voice of churches and non-sectarian charities. The debate on how

174. *Id.* at 628–29 (internal citation and footnote omitted).

175. *Id.* at 629.

176. Buckles, *A Reply*, *supra* note 18, at 1085–86.

best to protect the integrity of charitable institutions without unduly stifling their voices on matters of public policy will be most productive only when the country identifies the truly compelling rationales for limiting the political speech of churches and other § 501(c)(3) entities.

The legal literature has generated several reasons to reject unabridged electioneering by § 501(c)(3) entities, including churches.¹⁷⁷ Some of these reasons are plausible. However, this country's long-standing commitment to separation of church and state is not one of them. To justify the ban on the ill-conceived notion that it finds support in the separation norm is to hinder prospects for reforming current law, which excessively restricts the charitable sector's voice in matters of public policy.¹⁷⁸ This erroneous invocation of the separation norm clouds the real issues, perhaps even eroding respect for the norm by those who have repeatedly heard that they should not publicly express their most deeply held religious convictions that relate to public life because of the "separation of church and state."

Enough is enough. Let us reject the unfounded, illogical, and counterproductive assertion that a commitment to separation of church and state explains the ban of § 501(c)(3). Once this assertion is eradicated, the nation can seriously undertake the task of reforming the regulation of political speech of churches and other charities through federal tax law.

177. For an analysis of several rationales for the ban as applied to charities, see Buckles, *Not Even a Peep?*, *supra* note 18, at 1078–95. See also Chisolm, *supra* note 18, at 337–52.

178. For a brief discussion of why religious and other charitable organizations should be permitted to engage in some degree of partisan political speech without suffering tax penalties, see Buckles, *Not Even a Peep?*, *supra* note 18, at 1095–97.